Supreme Court, U.S.

97 • 470 JUL 17 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

WALTER F. BIGGINS,

Petitioner,

vs.

HAZEN PAPER COMPANY, *et al.*,

Respondents.

Petition of Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION OF WRIT OF CERTIORARI

JOHN J. EGAN
Counsel of Record
MAURICE CAHILLANE
EGAN, FLANAGAN & COHEN
Attorneys for Petitioner
67 Market Street
P.O. Box 9035
Springfield, Massachusetts 01102-9035
(413) 737-0260

71535 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

131 pp

QUESTIONS PRESENTED

1. Whether, in an employment discrimination case, a court may permit the relitigation of the issue of the employer's proffered reason for termination even though all elements of collateral estoppel are present.

2. Whether, under the Seventh Amendment, where there is sufficient evidence to support the verdict and no identifiable error of law, a Court of Appeals can vacate a jury award and order a new trial based on its own view of the evidence and speculation as to the jury's motivation.

3. Whether the Court of Appeals violated the mandate of this Court by failing to reconsider the sufficiency of the evidence as ordered, and instead ordering a new trial, even though it assumed the evidence was sufficient to support the verdict.

LIST OF PARTIES

The parties to the proceedings are Walter F. Biggins, petitioner and plaintiff below; Hazen Paper Company, Robert Hazen and Thomas N. Hazen, defendants below; and respondents the Honorable Juan R. Torruella, Chief Judge, Hugh H. Bownes, Senior Circuit Judge, and Bruce M. Selya, Conrad K. Cyr, Michael Boudin and Norman H. Stahl, Circuit Judges of the United States Court of Appeals for the First District.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	v
Opinions Below	1
Statement of Jurisdiction	1
Statute, Rule and Constitutional Provision Involved	2
Statement of the Case	2
A. Statement of Facts	2
B. Proceedings Below	3
C. The Conduct Of the First Trial Vis-a-Vis The Pension And ADEA Issues.	12
Reasons for Granting the Writ	13
I. The Court Of Appeals Opinion Undermines The Principle Of Collateral Estoppel.	14
A. Permitting Relitigation Of An Employer's Reason For Dismissal In An Employment Discrimination Case Cannot Be "Harmless Error".	14

Contents

Page

B. Application Of Collateral Estoppel Cannot Be Denied Because It Could Create The Need For A New Trial. 20

II. The Court of Appeals' Order Of A New Trial Clearly Violates Established Law Under The Seventh Amendment And Acceptance Of The Court Of Appeals' Action Would Dramatically Expand Appellate Power And Undermine The Seventh Amendment. 22

A. An Appellate Court Has No Power To Make A Discretionary Grant Of A New Trial Based On Its View Of The Evidence. 22

B. An Appellate Court's Own Speculation About What The Jury Thought Cannot Constitute An Error of Law to Justify A New Trial Order. 24

III. The Circuit Court Order Violated The Mandate Of This Court. 26

A. A Writ Of Mandamus Should Issue To Order The Circuit Court To Comply With The Mandate. 26

Conclusion 30

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Allied Chem. Corp. v. Diaflon, Inc., 449 U.S. 33 (1980) 23

Bechtold v. City of Rosemont, 104 F.3d 1062 (8th Cir. 1997) 17

Biggins v. Hazen Paper Co., 953 F.2d 1411 (1992) ... 5

Biggins v. Hazen Paper Co., 513 U.S. 1013 (1994) ... 10

Biggins v. Hazen Paper Co., 111 F.3d 205 (1st Cir. 1997) 11, 15, 20, 21, 24, 25, 29

Briggs v. Pennsylvania R.R., 334 U.S. 304 (1948) 27

Colgrove v. Battin, 413 U.S. 149 (1973) 23

Curtis v. Loether, 415 U.S. 189 (1974) 22

Deen v. Gulf, Colorado & Santa Fe Ry. Co., 353 U.S. 925 (1957) 28

Deen v. Hickman, 358 U.S. 57 (1958), *cert. denied sub nom., Deen v. Gulf, Colorado & Santa Fe Ry. Co.*, 358 U.S. 874 (1958) 28

Federated Department Stores Inc. v. Moitie, 452 U.S. 394 (1981) 16, 17, 21

Contents

Page

Gaines v. Caldwell, 148 U.S. 228 (1893) 28

Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996) 23

General Atomic Company v. Felter, 436 U.S. 493 (1978) 28

Gulf, Colorado & Santa Fe Railway Company v. Deen, 158 Tex. 466, 312 S.W. 2d 933 (1958) 28

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 6, 7, 14, 15, 25, 26

In re Potts, 166 U.S. 263 (1897) 28

In re Sanford Fork & Tool Co., 160 U.S. 247 (1895) .. 27

Lavender v. Kurn, 327 U.S. 645 (1946) 25

Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094 (11th Cir. 1987) 17, 18

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 20

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) 23

Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433 (1830) 23

Contents

	Page
Postal Service Bd. of Govenors v. Aikens, 460 U.S. 711 (1983)	20
Sibald v. United States, 37 U.S. (12 Pet.) 488 (1838)	27, 28
Southern Pacific Railroad v. United States, 168 U.S. 1 (1897)	16
Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939)	27
St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993)	27
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)	7, 13, 14, 15, 20, 21
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	20
Texas & Pac. Ry. v. Anderson, 149 U.S. 237 (1893)	28
United States v. Fossott, 20 U.S. (1 How.) 445 (1858)	27
United States v. Smith, 331 U.S. 469 (1947)	28
Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425 (1978)	27
Will v. United States, 389 U.S. 90 (1967)	28

Contents

Page

Statutes Cited:

28 U.S.C. § 1255 1

28 U.S.C. § 1651(a) 1, 2

29 U.S.C. §§ 621, *et seq.* 3

29 U.S.C. § 623 2

29 U.S.C. §§ 1001, *et seq.* 3

Mass. Gen. L. c. 12 § 11I 3

Rules Cited:

Fed. R. App. P. 35(a) 9

Fed. R. Civ. P. 38 13

Fed. R. Civ. P. 38(a) 2, 23

Fed. R. Civ. P. 59 5

Fed. R. Evid. 404(a) 20

Local Rule 36.2(b)3 9

United States Constitution Cited:

Seventh Amendment ..... i, 2, 13, 22, 23, 24, 26

Other Authority Cited:

Restatement of Judgments 2d § 27 16

Contents

Page

APPENDIX

Appendix A — Order of the United States Court of Appeals for the First Circuit Denying Petition for Rehearing Entered May 14, 1997 ..... 1a

Appendix B — Opinion of the United States Court of Appeals for the First Circuit Decided April 18, 1997 ..... 3a

Appendix C — Order of the United States Court of Appeals for the First Circuit Dated August 10, 1994 ..... 24a

Appendix D — Orders of the United States Court of Appeals for the First Circuit Dated June 27, 1994 .. 26a

Appendix E — Order of the United States Court of Appeals for the First Circuit Dated March 1, 1994 . 36a

Appendix F — Opinion of the United States Court of Appeals for the First Circuit Dated October 18, 1993 ..... 38a

Appendix G — Order of the Supreme Court of the United States Dated April 20, 1993 ..... 51a

Appendix H — Opinion of the United States District Court for the District of Massachusetts Dated April 5, 1991 ..... 52a

Appendix I — Statute, Rule and Constitutional Provision Involved 91a

Petitioner Walter F. Biggins respectfully prays that a writ of certiorari be granted to review the judgment and orders of the Court of Appeals for the First Circuit entered in this case on June 27, 1994 and April 18, 1997 and/or that a writ of mandamus issue to the United States Court of Appeals for the First Circuit directing that judgment be entered for the petitioner, that the June 27, 1994 order of the en banc court be vacated and the October 18, 1993 order of the panel of the First Circuit be reinstated.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 111 F.3d 205. (Appendix B). The en banc order of the United States Court of Appeals for the First Circuit, entered on June 27, 1994, has not been reported. A copy of this order is attached to this petition as Appendix D. The panel opinion of the United States Court of Appeals for the First Circuit, entered on October 18, 1993, is attached as Appendix F. The memorandum and order of the district court for Massachusetts, rendered on Hazen Paper Company's post-trial motions and dated April 5, 1991, has not been reported and is attached as Appendix H. An opinion by this Court and an opinion by the United States Court of Appeals for the First Circuit, rendered at a prior stage of the present proceeding, are reported, respectively, at 507 U.S. 604 (1993) and 953 F.2d 1405 (1st Cir. 1992).

STATEMENT OF JURISDICTION

The date of the order and judgment of the Court of Appeals for the First Circuit sought to be reviewed is April 18, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a) or in the alternative under 28 U.S.C. § 1255.

Relief is not available in any other court. The petitioner Walter F. Biggins, filed a petition for rehearing in the First Circuit on May 2, 1997 which was denied (Pet. App. A). No other procedure

is available to the petitioner in the First Circuit. This Court has authority pursuant to 28 U.S.C. § 1651(a) to issue an extraordinary writ in aid of its appellate jurisdiction to require a lower court to obey the mandate of this Court. This case presents important questions as to review of facts found by a jury under the Seventh Amendment to the Constitution and failure by the circuit court to adhere to rules of res judicata and collateral estoppel.

STATUTE, RULE AND CONSTITUTIONAL PROVISION INVOLVED

Petitioner relies on the Seventh Amendment to the Constitution, the Age Discrimination in Employment Act, 29 U.S.C. § 623 and Fed. R. Civ. P. 38(a). *See* Pet. App. I.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner Walter Biggins was employed by the respondents from 1977 to June of 1986 as their technical director. (C.A. App. 458)*. Hazen Paper Company is a "paper converter" located in Holyoke, Massachusetts, with annual sales of approximately 40 million dollars. (C.A. App. 290-291). In the spring of 1986, Robert and Thomas Hazen confronted Biggins, then sixty-two, and accused him of disloyalty to the company, claiming he was involved in two businesses with his son. (C.A. App. 357-361). Biggins responded that the Hazens had given prior approval to his activities which were limited to advising his son. (C.A. App. 362-363). These businesses did not compete with Hazen, had never made any money, and one had been out of business for two years. (C.A. App. 362-370). The Hazens demanded that Biggins sign an agreement, which included a burdensome non-compete clause and confidentiality covenants. (C.A. App. 1138-1142). None of the younger employees in Biggins' department, in their thirties, was required to sign such an agreement. (C.A. App. 373). When Biggins objected to the terms, he was fired. Biggins' younger

* References are as follows: C.A. App. refers to the Record Appendix to the first appeal; R.A. refers to the Record Appendix to the second appeal.

successor, also in his thirties, was given beneficial terms in his agreement, which had been denied Biggins, including a covenant not to compete that encompassed six months instead of the two years required of Biggins. The successor was to be compensated while he did not compete, unlike Biggins who would not be compensated during the entire twenty-four months of his non-compete. (C.A. App. 775, 779, 1501-1508). The Hazens then tried to obtain Biggins' continued services as a consultant without providing the normal benefits given the younger members of his department. Mr. Biggins did say he would sign the agreement if the Hazens provided him with stock in the company that he had been promised by them. (The first jury found the stock to have a value of over $300,000.) The Hazens however insisted he sign the agreement as it was, without the stock or be fired.

B. Proceedings Below

After the petitioner, Walter Biggins, was terminated from his employment by the defendant, Hazen Paper Company, he filed a complaint of violations of 29 U.S.C. §§ 621, *et seq.*, (The Age Discrimination in Employment Act); 29 U.S.C. §§ 1001, *et seq.* Employee Retirement Income Security Act; the Massachusetts Civil Rights Act, Mass. Gen. L. c. 12 § 11I; breach of contract; fraud; conversion; and wrongful discharge.

The case was tried for five days to a jury which found that the defendants willfully violated the ADEA, violated ERISA, committed fraud, breached plaintiff's employment contract, and wrongfully discharged him.[1] In doing so, the jury answered a

---

1. Damages assessed were as follows:

ADEA	$560,775.00
ERISA	$100,000.00
Fraud	$315,000.00
Breach of Contract	$266,897.00
Wrongful Discharge	$ 1.00

special verdict form which included the following questions and answers:

> 4. Do you find by a preponderance of the evidence that defendants fired plaintiff for the purpose of preventing plaintiff from attaining vestment of pension benefits, in violation of ERISA?
>
> _X_ Yes __ No
>
> 6. Do you find by a preponderance of the evidence that defendants and plaintiff had agreed that defendants would compensate plaintiff with shares of Hazen paper Company stock?
>
> _X_ Yes __ No
>
> 7. Do you find that defendants wrongfully discharged plaintiff in order to deprive plaintiff of the promised stock compensation, in violation of Massachusetts Law?
>
> _X_ Yes __ No
>
> 9. Do you find by a preponderance of the evidence that defendants committed fraud by failing to compensate plaintiff with stock as promised, in violation of Massachusetts Law?
>
> _X_ Yes __ No

(I R.A. 74-78).

Respondents filed post-trial motions for judgment notwithstanding the verdict, to alter or amend the judgment and for a new trial, pursuant to Fed. R. Civ. P. 59. In their motion for a new trial, the respondents asserted that the jury could have confused the issues of pension discrimination and age discrimination and that, therefore, a new trial should be granted.

After a detailed consideration of the distinctions between ERISA and the ADEA, the trial judge denied the motion for new trial holding that "the Court finds no internal inconsistency in the verdict and the motion for new trial is denied." (Pet. App. 81a). The trial court determined that it was possible for an employer to have dual illegal motives with respect to both age and pension status. (Pet. App. 80a).

In the remainder of his post-trial opinion, the trial judge allowed the respondents' motion for judgment notwithstanding the verdict as to willfulness under the ADEA and as to the petitioner's claim under the Massachusetts Civil Rights Act. The trial judge denied the motion for judgment notwithstanding the verdict as to the remaining counts, including a challenge to the sufficiency of the evidence under the ADEA. (Pet. App. 59a).

Both parties filed appeals to the First Circuit Court of Appeals. On January 8, 1992, the First Circuit issued its decision which is reported at 953 F.2d 1405 (1st Cir. 1992). The court affirmed the judgment on the ADEA finding of age discrimination but reversed the trial court on the issue of willfulness under the ADEA, finding the evidence sufficient to sustain the jury's finding. *Biggins v. Hazen Paper Co.*, 953 F.2d at 1411-1412. The court affirmed the findings of a violation of ERISA, fraud and wrongful discharge, but reversed the judgment in favor of petitioner for breach of contract. The court reduced the amount of damages awarded the petitioner under the ADEA (under the respondents' motion to alter or amend the judgment) and affirmed the trial court in all other respects, including its denial of the respondents' motion for a new trial. *Biggins* at 1412-1415.

Respondents filed a petition for rehearing and suggestion for rehearing en banc. In that petition, there was absolutely no reference to the district court's denial of the motion for a new trial and the circuit court's affirmance of it, and there was no other allegation of an error of law in the conduct of the trial. The petition was denied. Respondent then filed a petition for a writ of certiorari in this Court seeking review of two issues under the motion for judgment notwithstanding the verdict. The petition, made absolutely no reference to the denial of the motion for new trial by the district court and did not suggest in any way that a new trial would be an appropriate order or remedy, nor did it make any reference to an error of law in the conduct of the trial. This Court granted certiorari on June 22, 1992, to decide two questions; raised by the motion for judgment notwithstanding the verdict:

> . . . does an employer's interference with the vesting of pension benefits violate the ADEA? Second, does the *Thurston* standard for liquidated damages apply to the case where the predicate ADEA violation is not a formal, facially discriminatory policy, as in *Thurston*, but rather an informal decision by the employer that was motivated by the employee's age?

Hazen Paper Co. v. Biggins, 507 U.S. 604, 608 (1993).

This Court held that pension discrimination based on years of service (as opposed to age) could not be the evidentiary basis for upholding a jury verdict under the ADEA. Since the Court of Appeals had in part relied on this evidence and because "there was additional evidentiary support for ADEA liability," this Court, remanded the case with the following statement:

> In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's

> explanation for its decision — here, that respondent had been disloyal to Hazen Paper by doing business with its competitors — is "unworthy of credence" *Aikens*, 460 U.S., at 716 (quoting *Burdine*, 450 U.S. at 256). But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. *This issue is now before us in the Title VII context*, see Hicks v. St. Mary's Honor Center, *970 F.2d 487* (CA 8 1992), *cert. granted*, 506 U.S. (1993), *and we will not address it prematurely. We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation.*

Hazen Paper Co. v. Biggins, 507 U.S. 604, 614 (1993). (Emphasis added).

On June 25, 1993, this Court rendered its decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), holding, that the rejection of the defendants' proffered reasons is enough at law to sustain a finding of discrimination, provided there is a finding of discrimination. *St. Mary's Honor Center*, at 511. After this case was remanded to the First Circuit, both parties were requested by the court, in accordance with this Court's mandate, to submit briefs directed to the question of "whether the jury had sufficient evidence to find an ADEA violation."

Neither party nor the Court of Appeals suggested the issue of a new trial was still open or that the court had any grounds or power to order one, nor did anyone contend there had been any error of law in the conduct of the trial.

On October 18, 1993, the Court of Appeals' panel issued its

decision. The court found that, absent the pension evidence, there was still sufficient evidence of a violation of the ADEA:

> . . . plaintiff has met his burden of proving discrimination: he proved a prima facie case; the jury disbelieved the employer's reasons for discharging the plaintiff; and the plaintiff met his ultimate burden of persuasion by adducing additional evidence of age discrimination. See *St. Mary's*, 113 S.Ct. at 2742.
>
> Reading *Hazen Paper* and *St. Mary's* in tandem compels us to conclude that, absent any evidence of interference with the vesting of plaintiff's pension, there was sufficient evidence for the jury to find an ADEA violation.

(Pet. App. 49a).

Following the decision, the respondents filed a petition for rehearing and suggestion for rehearing en banc. That petition asked the court to reverse the panel's holding and find the evidence insufficient. Nothing in the petition requested or suggested any grounds for the ordering of a new trial or any error of law in the conduct of the trial. That petition was filed on October 29, 1993. Over four months later the en banc court issued an order that the parties show cause why the ADEA count alone should not be remanded for a new trial, stating:

> Having examined the record, the en banc court is concerned whether the likelihood that the jury took negative account of the defendants' ostensible desire to deprive the plaintiff of a pension — a factor that the Supreme Court outlawed as a basis for the ADEA verdict, *see Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1705-07 (1993) — is sufficiently great that the

> interests of justice require a new trial on the age discrimination claim.

(Pet. App. 37a).

The parties filed briefs on this issue. Neither the court nor any party suggested there had been an "error of law" in the "conduct of the trial".

On June 27, 1994 the en banc court issued an order[2] withdrawing the panel's opinion and remanding the ADEA count for a new trial. The order stated in part:

> The court . . . has concluded that the likelihood of verdict contamination with respect to the count at issue is sufficiently great that the interests of justice require a full new trial on the age discrimination claim.

(Pet. App. 32a).

Petitioner filed a petition for rehearing of the denial of petitioner's constitutional and statutory right to a trial by jury. Rehearing was denied on August 10, 1994. (Pet. App. 25a). In response to the March 1, 1994, Order, the petitioner had argued, *inter alia*, that if a new trial were to be ordered, the petitioner should be permitted to seek additional damages on his common law claims since the jury, following the direction of the district court, had originally allocated damages among the counts, and the plaintiff could have been awarded his back pay (awarded under the ADEA) under the fraud count had the jury not been told not to duplicate damages. In its June 27th Order the court did discuss

---

2. No opinion was written and, therefore, none published as Local Rule 36.2(b)3 requires. No mention was made of Fed. R. App. P. 35(a) as to whether an en banc proceeding was appropriate, even though the circumstances certainly did not meet the criteria provided by that rule.

this at some length, holding that it had no jurisdiction to grant a new trial on damages under the common law counts because no en banc review of those claims had been sought and because the petitioner had not originally made such claims part of his cross appeal. The court did not explain how it could have jurisdiction over the issue of a new trial on one count when no en banc review had ever been sought of the denial of a new trial, and when the issue had been fully put to rest by the first appellate panel.

Petitioner then filed a petition in this Court for a writ of mandamus and/or writ of certiorari; challenging the en banc court order of June 27, 1994. The petition was denied. *Biggins v. Hazen Paper Co.*, 513 U.S. 1013 (1994).

The case came for a second trial in the District Court on April 15, 1995. Only the ADEA count was tried. After nine days of trial the jury returned a verdict in favor of the respondents.

Prior to trial, petitioner made several motions with respect to the findings of the first jury (on counts where he had obtained final judgment in his favor) on issues relevant to the second trial. Petitioner moved that the respondent not be permitted to present evidence or argument which contradicted the final and binding findings of the first jury. Accordingly, plaintiff moved that defendants be prohibited from providing evidence of or arguing:

- that the plaintiff had not been fired but left voluntarily;

- that the plaintiff was fired because he was disloyal;

- that the plaintiff's disloyalty created a need for the defendants to dictate that he sign a restrictive covenant;

- that the plaintiff was seeking a "raise" or

> higher compensation by requesting the stock that the first jury had found he had been promised and defrauded of.

Plaintiff moved that the findings be taken as established and be treated as such before the second jury. The motions were denied. At the second trial defendants were then permitted to completely relitigate the very issues already decided by the first jury, including the issue of whether Mr. Biggins had ever been promised stock at all and whether he had engaged in actions which were disloyal to the company. The stock promise and disloyalty issues constituted the basis for the respondents proffered reason for dismissal. They alleged that petitioner's disloyalty created the need to require him to sign a restrictive covenant, which he in turn refused to sign without the promised stock. He was then fired. The first jury, in finding for the petitioner under the ERISA and wrongful discharge counts, had necessarily rejected this proffered reason for dismissal.

The relitigated issues were the dominant issues of the second trial. In his opening, respondents' counsel stated that Thomas Hazen most certainly did not promise Mr. Biggins stock in the company (II R.A. 471) and that the promise had been "made up" (II R.A. 489). Nine witnesses testified at length concerning the issues surrounding Mr. Biggins' supposed disloyalty (IV R.A. 1373-1442, V R.A. 1790-1810). In closing argument, defense counsel spent the majority of his time on the issues of the stock promise, whether Mr. Biggins was really fired and his alleged disloyalty. (VI R.A. 1991-2010).

Petitioner filed a motion for judgment as a matter of law (based on the collateral estoppel issues discussed below) and alternatively for a new trial. The district court denied the motions. Petitioner appealed to the First Circuit Court of Appeals. Petitioner reasserted his challenge to the new trial order of the en banc court and its failure to adhere to the mandate of this Court. The Court of Appeals affirmed the district court. *Biggins v. Hazen Paper Co.*, 111 F.3d 205 (1st Cir. 1997). (Pet. App. 3a).

C. The Conduct Of The First Trial Vis-a-Vis The Pension And ADEA Issues.

The first trial judge's instructions to the jury (to which there were no relevant objections) on the ADEA count were devoid of any suggestion or implication that Mr. Biggins' pension status was in any way related to age discrimination, neither the Court of Appeals nor the respondents have ever contended to the contrary. The trial court instructed the jury:

> Plaintiff alleges that he was fired in violation of a Federal law, the Age Discrimination in Employment Act. The substance of this Federal law is that it is unlawful for an employer to discharge or otherwise discriminate against an employee over forty years old because of the employee's age. The purpose of the law is to promote the employment of older persons based on ability rather than age, and to prevent the arbitrary classifications of employees based on age.

(C.A. App. 1082-1083).

The trial judge made clear that "[p]laintiff must prove by a preponderance of the evidence that the employer's reason is mere pretext — a show or a cover-up — for what was in truth a discriminatory purpose" (C.A. App. 1085) and that *age must have been the determining factor.*" (C.A. App. 1086) (emphasis added). There was no reference whatsoever to pension status. The trial judge began the instruction with the admonition that there were eight "separate" counts. (C.A. App. 1082). He then repeated and summarized the shifting burden test, again without reference to pension. (C.A. App. 1087-8). Next the trial judge went to the ERISA claim, and unambiguously distinguished its elements from those of the ADEA count. At the heart of the pension claim, he said, was the allegation that Mr. Biggins "would have become

entitled to pension benefits within a short period of time, but that Defendants fired him before his benefits could vest." *Id.* at 1089. The required proof, said the judge, was a showing "that Defendants fired Plaintiff for the purpose of preventing vestment of pension benefits." *Id.* The special verdict form addressed each count separately.

REASONS FOR GRANTING THE WRIT

This petition raises several important questions under the Constitution and establish Federal Procedure. The petition presents three issues. The Court of Appeals opinion permitted relitigation of an employer's reason for dismissal in a discrimination case, even though all aspects of collateral estoppel were conceded to be present, holding in part, that relitigation of such an issue was "harmless error" and that res judicata and collateral estoppel could be ignored where their application on appeal could result in a new trial. This ruling is at odds with this Court's established law of res judicata and would certainly undermine the principle of collateral estoppel, making its application optional and discretionary.

Secondly, the Court of Appeals action conflicts with this court's established standards for the review of jury verdicts under the Seventh Amendment. The Court of Appeals ordered a new trial *sua sponte,* based on the appellate court's own belief and feelings as to what the jury was thinking and its own view of the evidence, without identifying any error of law in the proceedings below. Under the Seventh Amendment to the Constitution and Fed. R. Civ. P. 38 a Court of Appeals has no power to grant a new trial because of its own subjective view of what it believes the jury was thinking. This violates the firmly established standard that absent an error of law only the trial court may grant a new trial.

Lastly, the Court of Appeals refused to obey the mandate of this Court. This Court determined that Mr. Biggins could recover under the ADEA if there was sufficient evidence under the standards that the Court was to consider in *St. Mary's Honor Center*

v. Hicks, 509 U.S. 502 (1993). The panel of the First Circuit on remand determined that under *Hicks* there was sufficient evidence. The en banc court did not dispute this. The second panel conceded this was so. Instead, ignoring the mandate of this Court, the en banc court ordered a new trial without obeying the mandate to assess the sufficiency of the evidence. Thus, even though the evidence was sufficient to support the first jury's findings, and there was no error of law in the proceedings, the en banc court ordered a new trial based solely on its own speculations as to the jury's thoughts.

I. THE COURT OF APPEALS OPINION UNDERMINES THE PRINCIPLE OF COLLATERAL ESTOPPEL.

A. Permitting Relitigation Of An Employer's Reason For Dismissal In An Employment Discrimination Case Cannot Be "Harmless Error".

The second jury in this case was confronted with several of the same issues as the first jury. Respondent's defense to all of the claims presented to the first jury was that Mr. Biggins "had been disloyal by doing business with competitors" and that therefore he "was asked to sign a confidentiality agreement" *Hazen Paper Co., v. Biggins*, 507 U.S. 604, 613 (1993). Part and parcel of this proffered reason for Mr. Biggins dismissal, was that Mr. Biggins would not sign the confidentiality and restrictive covenant agreement without being provided the company stock he had been promised. The stock promise therefore, played a central role in the respondents reason for termination. Respondents also claimed at both the first and second trial that the petitioner had not really been fired at all.[3]

The first jury specifically found that Mr. Biggins had been

3. The relitigation of this issue was mitigated somewhat by the trial courts' instructions to the jury that the petitioner had in fact been terminated. Nevertheless respondents were still permitted to argue that Mr. Biggins really left of his own will.

promised the stock, defrauded of it, and that he had been fired (*See* pp. 4-5). It explicitly and necessarily rejected the respondent's proffered reason for dismissal when it found in favor of the plaintiff under the ERISA and wrongful discharge claims. There was no dispute that these findings were all final. The Court of Appeals conceded that the issues were relitigated. *Biggins v. Hazen Paper Co.*, 111 F.3d at 210. (Pet. App. 12a-13a).

The plaintiff moved in limine that the first jury's findings be taken as established, presented to the jury as such, and that the defendant be prevented from presenting evidence or argument contradicting these established findings. The trial court denied these motions (I R.A. 80). The same issue was revisited in the plaintiff's Motion for Judgment as a Matter of Law and Alternatively for a New Trial. Each motion was denied, without written opinion. Defendants took full advantage, presenting the bulk of their evidence and argument on issues already determined against them by a prior jury.

There could be no question but that in the eyes of the defendants, as well as the plaintiff, the issues of the stock promise, whether Mr. Biggins was "fired," and loyalty were critical issues necessary to the outcome of the case and in fact constituted the heart and sole of the second trial, as they did the first. This Court itself has recognized that the "loyalty" issue was the employer's proffered reason in this case and that the employer's proffered reason plays a critical role in an employment discrimination action. *Hazen Paper Co. v. Biggins*, 507 U.S. at 612-614. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-510 (1993).

The Court of Appeals (and for all intents and purposes the trial court) conceded that the elements of collateral estoppel were present. The applicable standard was stated Justice Harlan in 1897:

> The general principal announced in numerous cases is that a right, question, or fact distinctly put in issue and directly

> determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them.

Southern Pacific Railroad v. United States, 168 U.S. 1, 48-49 (1897). *See also* Restatement of Judgments 2d § 27 at 250.

It has been firmly stated by this Court, that the established rules of res judicata do not admit to exceptions "on the equities" or in the "interests of justice." *Federated Department Stores Inc. v. Moitie*, 452 U.S. 394 (1981) there, this Court held:

> A final judgment on the merits of an action precluded the parties or their privies from relitigating issues that were or could have been raised in that action. Commissioner v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715,

> 719, 92 L.Ed. 898 (1948); Cromwell v. County of Sac, 94 U.S. 31, 352-353, 24 L.Ed. 195 (1876) . . .
>
> The Court of Appeals also rested its opinion in part on what it viewed as "simple justice." But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principal of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." Heiser v. Woodruff, 327 U.S. 726, 733 66 S.Ct. 853, 856, 90 L.Ed. 970 (1946). . . . We have stressed that "[t]he doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . ." Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917).

Federated Department Stores Inc. at 400-401.

The existing case law in the Circuit Courts makes clear that nothing about the employment discrimination context makes application of issue preclusion principles inappropriate. *Bechtold v. City of Rosemont*, 104 F.3d 1062 (8th Cir. 1997). In *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094 (11th Cir. 1987),

the plaintiff prevailed in the jury trial of an ADEA claim. The district court granted a judgment notwithstanding the verdict, but the Circuit Court of Appeals reversed and reinstated the jury verdict, remanding the case for a determination of willfulness. *Id.* at 1096. The district court then decided the willfulness issues, found no willfulness and in doing so relied on the employer's proffered, non-discriminatory reasons that were the employer's defense to the underlying claim. *Id* at 1097. The Court of Appeals reversed, holding:

> The court was not at liberty to make findings that conflicted with the jury's findings . . . it is well settled that the court may not make findings contrary to or inconsistent with the jury's resolution of the same issue as implicity reflected in its general verdict . . . (citations). . . . Because the jury rejected ACIPCO's reasons for its actions as pretext for age discrimination, the court was not free to resurrect those same reasons to prove ACIPCO's "good faith."

Id. at 1097-1098.

Here, the trial court felt compelled to permit the relitigation of issues because the en banc court had ordered a full new trial to be conducted. Thus the only reason the trial court could point to for denying the petitioner's motions was the problem presented by the petitioner being correct, namely there should never have been a new trial in the first place:

> What we would have at this level if I were to give preclusive effect to everything that happened in the previous case, would simply be the plaintiff putting on a prima facie case, the defendants standing up attempting to offer a defense, the plaintiff point out that

> they are precluded from doing that based upon the prior jury finding, the defendants folding their arms and sitting down and proceeding then to closings, and I don't think that constitutes a full new trial.
>
> So the Court of Appeals must have had something else in mind for purposes of what went on here, and that practical consideration combined with my assessment of the legal requirements of collateral estoppel/res judicata has determined, from my point of view, that this case should be a full new trial and the defendants should be permitted to offer a defense that there was no termination in this case.

(II R.A. 438-441).

Another court comment during trial demonstrated the stark fact that the defendants were simply being exempted from the law of res judicata and issue preclusion:

> Even if it was, I've already ruled that I'm not going to go down the path of trying to maintain consistency with the first trial because if I start down that path, there is no principal (sic) way that we should even be having this trial in the first place because the jury conclusively found that there was no legitimate reason for what the defendants did here and there simply wouldn't be a trial. . . .

(V R.A. 1609-1612)

The Court of Appeals however (at least the en banc court) was not constrained to adhere to its own order. The Court of

Appeals conceded the obvious, that issues had been relitigated. *Biggins v. Hazen Paper Co.*, 111 F.3d at 210. (Pet. App. 12a-13a). It then reached an incredible conclusion: that the relitigation of the issues (or at least the stock promise) was "harmless error." (Pet. App. 13a). The court treated the matter as if it were merely an evidentiary issue — whether exclusion of the binding finding of the respondent's fraud was admissible under Fed. R. Evid. 404(a). But even as to the stock promise, this was never just an evidentiary issue[4]. Petitioner was not moving for its admission for the purpose of making the Hazens look bad in terms of character. The fact is that the issue of the stock promise (even by itself) was central to the proffered reason for dismissal; it was the dispute that created Mr. Biggins' termination. The employer's asserted reason for dismissal and its validity is a critical issue in an employment discrimination case as this Court has often held. *St. Mary's Honor Center,* at 506-511, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Postal Service Bd. of Govenors v. Aikens*, 460 U.S. 711, 716 (1983). Permitting relitigation of such an issue could not logically be construed as harmless error and to do so in effect eviscerates the principle of collateral estoppel.

B. Application Of Collateral Estoppel Cannot Be Denied Because It Could Create The Need For A New Trial.

As to the third collateral estoppel issue[5] — the fact that the

4. The thrust of plaintiff's motions was to prevent the introduction of evidence or argument that contradicted a prior final and binding jury verdict. Instructing the second jury as to the first jury's findings was one alternative-but would never have been necessary if the introduction of evidence or agrument had not been allowed. The Court of Appeals ultimate discussion of this as a "character evidence" and jury instructions issue is a red herring that evades the larger issue.

5. The Court of Appeals was never clear whether its "harmless error" theory applied only to the stock issue or as to the reason for dismissal itself. If, however, it did not apply to the proffered reason for dismissal, then the only basis stated for ignoring collateral estoppel is that its application might require a new trial, certainly not grounds for ignoring a mandatory rule of law.

first jury necessary rejected the respondents proffered reason for dismissal in its findings under both ERISA and the common law wrongful discharge claim, the appeals court never fully addresses this at all. It discusses only whether the jury should have been told that Mr. Biggins was wrongfully discharged, again speculating that petitioner only wanted to make respondents look bad, when in fact what was at stake was the whole validity of the employer's reason for dismissal. The Court of Appeals goes on to make an even more incredible claim, stating:

> After all, the issues have now been relitigated, collateral estoppel is a doctrine of judicial economy and one might wonder whether assuming no other error — such an objective would be served by a third trial.

Biggins v. Hazen Paper Co., 111 F.3d at 210. (Pet. App. 15a).

In other words, the Court of Appeals holds that if application of collateral estoppel could result in a new trial, its application is optional.[6] The idea that collateral estoppel, or any rule of law should be denied or avoided on grounds that its application could result in a new trial is not only a proposition for which there is no authority, but is a denial to the petitioner of the rule of law itself.

These two propositions: that relitigation of an employer's proffered reason for dismissal is harmless error and that collateral estoppel need not apply if it will result in a new trial, are the lynchpins of and, indeed, the only stated rationales of the Court of Appeals. But, if this is so, then this court's firm principles as stated in *Federated Dependent Stores v. Moitie* are meaningless and subject

---

6. A new trial (conducted in accordance with the law of collateral estoppel) was one option, judgment as a matter of law for the petitioner was also appropriate. *See St. Mary's Honor Center*, 509 U.S. at 506-509. Of course, the existence of this problem is one reason the new trial should never have been ordered in the first place.

to the discretion of the lower courts. Ironically the same Court of Appeals which ordered a new trial *without* finding *any* error of law, then ignored an error of law it concedes it existed, on grounds that it doesn't wish for another trial.

II. THE COURT OF APPEALS' ORDER OF A NEW TRIAL CLEARLY VIOLATES ESTABLISHED LAW UNDER THE SEVENTH AMENDMENT AND ACCEPTANCE OF THE COURT OF APPEALS' ACTION WOULD DRAMATICALLY EXPAND APPELLATE POWER AND UNDERMINE THE SEVENTH AMENDMENT.

A. An Appellate Court Has No Power To Make A Discretionary Grant Of A New Trial Based On Its View Of The Evidence.

The Order of the Court of Appeals in this case violates several long-standing fundamental principles of the Seventh Amendment and of federal procedure as to trial by jury. The Court of Appeals lacks the authority to grant a new trial (absent an error of law or insufficiency of the evidence) for any reason, let alone on the grounds cited.

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.[7]

---

7. The Seventh Amendment applies equally in actions to enforce statutory rights where the statute provides a right to trial by jury, *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

Fed. R. Civ. P. 38(a) provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

This Court has consistently held for decades that this amendment prohibits a court from reexamining facts found by a jury in any manner other than that allowed at common law as it existed in 1791. *Colgrove v. Battin*, 413 U.S. 149 (1973). This includes a prohibition against the ordering of a new trial by an appellate court for any reason other than an error of law in the proceedings below. *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433 (1830); *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211 (1996).

It is *the trial court alone* to whom the discretion belongs to grant a new trial. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (motions for new trial are committed to the discretion of the district court, and Court of Appeals was mistaken in granting new trial itself). *Allied Chem. Corp. v. Diaflon, Inc.*, 449 U.S. 33, 36 (1980) ("the authority to grant a new trial is confided almost entirely to the exercise of discretion on the part of the trial court").

This Court has recently reaffirmed that under the Seventh Amendment a ruling on a Motion for New Trial may be reviewed only on an abuse of discretion standard. *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2223-4 (1996). Here the Court of Appeals completely ignored the trial court ruling and revived the new trial issue, *sua sponte*, two years after it had been put to rest.

B. An Appellate Court's Own Speculation About What The Jury Thought Cannot Constitute An Error Of Law To Justify A New Trial Order.

Under the Seventh Amendment an appellate court may of course grant a new trial for an error of law in the proceedings below. In this case when the en banc court issued its briefing order, it never suggested that there was any error of law in the conduct of the trial. (Pet. App. 37a). The order for new trial makes no mention of any error of law in the conduct of the trial. Both orders speak only to one thing: the en banc court's "concern" as to what evidence the jury took into "negative account", thereby supposedly creating "verdict contamination." (Pet. App. 32a). The order consists of nothing more than the court's own speculation as to what evidence the jury was thinking about when it found in favor of the petitioner. There was no suggestion from the en banc court of any error in the introduction of evidence, in the conduct of the parties or in the jury instructions and no suggestion that the evidence was insufficient to support the verdict.[8]

Confronted with this matter directly for the first time, the panel on the second appeal, which included one of the en banc court judges, did discuss the issue, stating:

> The en banc court did find prejudicial legal error in the conduct of the original trial. The court's appraisal, as noted earlier, was that the jury was potentially misled by the same error that the Supreme Court identified in the first panel decision, namely, a belief that the wrongful motive (pension interference) that gave rise to an ERISA violation of itself constituted wrongful motive under the

8. Indeed the second panel assumes the sufficiency of the evidence. *Biggins v., Hazen Paper Co.*, 111 F.3d at 209. (Pet. App. 10a-11a).

> ADEA.[9] Whether or not the en banc court's assessment of prejudice was invincibly supported the en banc court was free under the Seventh Amendment to make the judgment.

Biggins v. Hazen Paper Co., 111 F.3d at 208. (Pet. App. 9a).

Where is the error of law which the court itself concedes is necessary? Nowhere. There is not even an allegation of any error in the admission of evidence, conduct of the parties, jury instructions or the sufficiency of evidence. The panel asserts that an "error of law" exists in the form of the en banc court's "appraisal" of how it feels the jury was "misled" by a "belief" that one wrongful motive constituted another.[10] There is of course no way for the court to know what the jury believed and no basis whatsoever for the court to make an assessment of "prejudice". The jury instructions treated the matters separately. The court operates under the fundamental misconception that as an appeals court it is engaging in the same process the jury engages in. But the first panel only held that the pension evidence *could* have been evidence to support the verdict. This court then held that the pension evidence could not be used to support the verdict. *Hazen Paper Co.* at 613-614. Neither the first panel nor this Court were determining that the ERISA violation in this case did or did not constitute a violation of the ADEA. The order further *reverses* the established standard that a jury's verdict must be upheld unless there is "a complete absence of probative facts to support the conclusion reached." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

---

9. This obviously misstates this Court's analysis since this court was ruling on the sufficiency of the evidence under a motion for judgment notwithstanding the verdict, *not* making the factual jury determination of the existence of age discrimination.

10. The Court of Appeals reaches the point of absurdity by stating that its "concern" was not "out of the blue" because the complaint alleged the pension violation was age discrimination *Biggins* at 208, n.2. (Pet. App. 9a). But the jury never saw the complaint and such argument was not made to the jury. Likewise the jury could not have been misled by *post trial* legal arguments.

By obviously blurring the distinct roles of judge and jury, the second panel and the en banc court make themselves out to be the ultimate factfinder and guardians of the result they wish for. For an appellate court to take it upon itself to assess the evidence in order to determine "prejudice" and to make an "appraisal" of what the jury's motive was (without any error in the evidence, the instructions or lack of sufficiency in the evidence) is to do precisely what the Seventh Amendment forbids.

If appellate courts are permitted under the guise of an "error of law" to make their own assessment of how the jury viewed the evidence, then the Seventh Amendment will have no meaning at all and appellate courts will have ultimate power to overturn jury verdicts whenever they believe it is in "the interests of justice", as defined by their own subjective speculations.

III. THE CIRCUIT COURT ORDER VIOLATED THE MANDATE OF THIS COURT.

A. A Writ Of Mandamus Should Issue To Order The Circuit Court To Comply With The Mandate.

Petitioner seeks a Writ of Mandamus to the First Circuit Court of Appeals on grounds that the en banc court failed to comply with the mandate of this Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). As noted above, the original petition for certiorari in this case sought review only of the Circuit Court's affirmation of the denial of the judgment notwithstanding the verdict. In ruling on that matter, this court ordered as follows:

> We therefore remand this case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation.

Hazen Paper Co., 507 U.S. at 614.

Reconsideration of the sufficiency of the evidence under the original motion for judgment notwithstanding the verdict was the only issue properly remaining in the case. The Circuit Court of Appeals' panel adhered to the mandate and reconsiderated the sufficiency of the evidence in light of this Court's opinion in this case and its subsequent opinion in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). In doing so the panel found sufficient evidence. (Pet. App. 49a).

The en banc court instead of reconsidering the sufficiency of the evidence, speculated as to the jury's behavior and ordered a new trial. The en banc court did not find the evidence insufficient, and it did not question the panel's opinion. Instead it wiped out the jury's verdict and almost seven years of trial and appellate litigation on the basis of an issue which, if it could be raised, was for the trial court, and which was certainly no longer before the court.

A lower court is "bound to carry the mandate of [an] upper court into execution and could not consider the questions which the mandate laid at rest." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939) (the mandate is conclusive as to matters actually decided and matters decided by necessary implication). This Court remanded the case for a determination of the sufficiency of the evidence. That issue was easily resolvable, especially in light of this Court's opinion in *St. Mary's Honor Center v. Hicks*.

Where a Court of Appeals has thus disobeyed the mandate of this Court, the appropriate remedy lies in a writ of mandamus. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-428 (1978), *quoting In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895), *accord United States v. Fossott*, 20 U.S. (1 How.) 445, 446 (1858).

This comports with decades of Supreme Court authority, that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Briggs v. Pennsylvania R.R.*, 334 U.S. 304 (1948). *See also Sibald v. United States*, 37 U.S.

(12 Pet.) 488, 492 (1838); *Texas & Pac. Ry. v. Anderson*, 149 U.S. 237 (1893); *In re Potts*, 166 U.S. 263, 266 (1897) (no authority to grant a new trial); *Gaines v. Caldwell*, 148 U.S. 228 (1893) (lower court could not order taking of new evidence); *Will v. United States*, 389 U.S. 90, 95-96 (1967) (mandamus will be to confine a lower court to the terms of an appellate court mandate); *General Atomic Company v. Felter*, 436 U.S. 493 (1978) (state court could not do what Supreme Court held it had no power to do); *cf. United States v. Smith*, 331 U.S. 469 (1947) (lower court could not grant criminal defendant a new trial simply "in the interests of justice" where Supreme Court mandate did not authorize a new trial).

The situation here is similar to *Deen v. Hickman*, 358 U.S. 57 (1958), *cert. denied sub nom., Deen v. Gulf, Colorado & Santa Fe Ry. Co.*, 358 U.S. 874 (1958). There, this Court had previously ruled that a plaintiff had presented sufficient evidence of negligence to support a jury verdict. *Deen v. Gulf, Colorado & Santa Fe Ry. Co.*, 353 U.S. 925 (1957). After remand, the Texas Supreme Court further remanded the case to the Texas Court of Appeals[11] to evaluate whether there were grounds for a new trial. *Deen v. Hickman* at 57-58. This Court held on a request for mandamus that the determination of the new trial issue had been foreclosed by its earlier decision, and that the Texas Supreme Court had to conform to the mandate and could not permit even consideration of a new trial at the lower level. *Deen v. Hickman* 358 U.S. at 58.

The second panel opinion stated that it was permissible for the en banc court to ignore the order to reconsider the evidence and instead order a new trial because this court did not address the "contamination" issue. This ignores the fact that the en banc court not only took an action not mandated by this Court, it refused to

11. Under a specific provision of the Texas state constitution, the Texas Court of Civil Appeals was permitted to grant new trials on the same grounds as a trial court, a power that did not rest with the Texas Supreme Court. *Gulf, Colorado & Santa Fe Railway Company v. Deen*, 158 Tex. 466, 471, 312 S.W. 2d 933, 937 (1958).

take the action that this court did order it to take and revived a matter laid to rest by the first appeal. Indeed the second panel now says it "assumes" the evidence was sufficient. (Pet. App. 10a-11a).

Given that the evidence was sufficient, the petitioner was therefore entitled to judgment in his favor. The idea that this Court somehow missed or failed to recognize a "contamination" issue begs the question as to what the "contamination" issue is. The second panel suggests it was an "error of law", an error which neither that second panel nor the en banc court could identify in any rational way. After *eight* appellate proceedings (including reconsideration motions) and *four* written opinion and/or "orders", no one has identified any error in the proceedings by way of evidence, conduct of counsel or jury instructions that represented "contamination" of the jury. For the Court of Appeals to suggest that the jury was "misled" by *post trial* legal arguments never presented to them, or a written complaint never shown to them (*Biggins v. Hazen Paper Co.*, 111 F.3d at 208, n.2), (Pet. App. 9a), and to further suggest that this Court failed to address this phantom "contamination" issue, makes a mockery of this Court's authority and the whole appellate process.

Had the en banc court properly adhered to the mandate, there would never have been a new trial where the trial court was forced to turn a blind eye to governing rules of collateral estoppel. This case presents an opportunity to demonstrate that adherence to established rules of law is what truly serves both judicial economy and the interests of justice.

CONCLUSION

For the reasons stated above a writ of certiorari be granted and/or a writ of mandamus should issue to the United States Court of Appeals for the First Circuit directing an entry of judgment for the petitioner.

Respectfully submitted,

JOHN J. EGAN
Counsel of Record
MAURICE CAHILLANE
EGAN, FLANAGAN & COHEN
Attorneys for Petitioner
67 Market Street
P.O. Box 9035
Springfield, Massachusetts 01102-9035
(413) 737-0260

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING ENTERED MAY 14, 1997

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1870

WALTER F. BIGGINS,

Plaintiff, Appellant,

v.

THE HAZEN PAPER CO., ET AL.,

Defendants, Appellees.

No. 96-1871

WALTER F. BIGGINS,

Plaintiff, Appellee,

v.

THE HAZEN PAPER CO., ET AL.,

Defendants, Appellants.

Before

TORRUELLA, *Chief Judge*,
BOWNES and CAMPBELL, *Senior Circuit Judges*,
SELYA, BOUDIN, STAHL and LYNCH,
Circuit Judges.

ORDER OF COURT

Entered: May 14, 1997

Appendix A

The panel of judges that rendered the decision in this case, having voted to deny the petition for rehearing and, the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

s/ William H. Ng
Clerk.

[cc: Messrs. Leonard, Callan, Mason, Gordon, Egan and Cahillane]

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DECIDED APRIL 18, 1997

Walter F. BIGGINS, Plaintiff, Appellant,

v.

The HAZEN PAPER COMPANY, Robert Hazen and Thomas N. Hazen, Defendants, Appellees.

Walter F. BIGGINS, Plaintiff, Appellee,

v.

The HAZEN PAPER COMPANY, Robert Hazen and Thomas N. Hazen, Defendants, Appellants.

Nos. 96-1870, 96-1871.

United States Court of Appeals,
First Circuit.

Heard Dec. 6, 1996.

Decided April 18, 1997.

* * *

Maurice M. Cahillane, Springfield, MA, with whom John J. Egan and Egan, Flanagan and Cohen, P.C., were on briefs, for plaintiff.

Robert B. Gordon, Boston, MA, with whom John H. Mason and Ropes & Gray were on briefs, for defendants.

Appendix B

Before BOUDIN, Circuit Judge, CAMPBELL and BOWNES, Senior Circuit Judges.

BOUDIN, Circuit Judge.

This Flying Dutchman of a case has returned to us after a first trial, a panel decision, Supreme Court review, a further panel decision, an en banc order directing a further trial on one count, and then a second trial, followed now by the instant appeal. We hope that this opinion will bring the matter to a close, for a decade of litigation about a single, narrow event is enough.

I.

The case began in February 1988 when Walter Biggins brought suit in district court against his former employer, Hazen Paper Company, and its two principals, Robert Hazen, the president, and his cousin, Thomas Hazen, the treasurer. The company is a small but successful maker of specialty papers of various kinds. Biggins joined the company in 1977, at age 52, and served as its technical director for about nine years. He had no written employment contract.

During his employ, Biggins developed a superior waterbased paper coating that increased the company's sales. He sought a larger salary, was given a small increase, but remained unsatisfied and sought a further increase. Biggins later claimed that in 1984 Thomas Hazen had promised him company stock instead of a further raise; Thomas Hazen denied making any such promise.

Biggins, during his employ by the company, was also involved in two different ventures with his sons. When Thomas

Hazen learned of this, he sought a confidentiality agreement from Biggins, limiting his outside activities during, and for a limited time after, his employment with the company. Biggins refused to sign, except in exchange for the stock he said had been promised. He was discharged in June 1986 — a few weeks before his rights under the company pension plan would otherwise have vested.

Biggins then sued the company and the Hazen cousins (collectively "the Hazens") in an eight-count complaint. The first two counts charged the Hazens with age discrimination under the ADEA and interference with pension rights under ERISA. [FN1] The remaining claims, of limited importance to this appeal (except for the contract claim), were for wrongful deprivation of property, wrongful discharge, fraud, conversion, breach of contract and violation of the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H and 11I.

> FN1. ADEA is the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. and ERISA is the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.

In substance, Biggins claimed under the first two counts, respectively, that he had been fired on account of his age — he was replaced with a younger man — and to prevent the vesting of his pension. In additional counts, he also sought the value of the stock allegedly promised by Thomas Hazen and the benefit of the paper-coating formula and method, which Biggins claimed to own. The gravamen of the remaining counts was that he had been wrongfully discharged in violation of various rights protected under state law.

Appendix B

In its verdict, the jury largely accepted Biggins' position, apart from his claim to ownership of the formula, which it rejected. On the ADEA claim, the jury awarded him around $560,000; the ERISA award was $100,000, later adjusted downward to $93,000 on appeal. The fraud award for the allegedly promised stock was about $315,000. Biggins was also awarded just under $267,000 for discharge in violation of contract. On two other counts, only nominal damages were awarded.

Because the jury found that the age discrimination was willful, the award on the ADEA count would normally have been doubled, see 29 U.S.C. § 626(b), but the district court granted judgment n.o.v. in favor of the Hazens on the issue of willfulness. In other respects, the district court upheld the jury verdict against various post-trial motions. We reserve for later discussion the issue of attorney's fees, which the district court also addressed.

On appeal, a panel of this court affirmed the district court with several exceptions. Biggins v. Hazen Paper Co., 953 F.2d 1405 (1st Cir.1992). Two are pertinent here: first, the panel found that the evidence on the ADEA count supported damages (before doubling) of only about $420,000, but the panel also reinstated the willfulness finding and doubled the reduced award to about $840,000. Id. at 1416. Second, the panel set aside the contract claim verdict for lack of sufficient evidence to establish a contract. Id. at 1421-24.

The Supreme Court then granted certiorari and vacated the panel decision on the ADEA count. Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S.Ct 1701, 123 L.Ed.2d. 338 (1993). The Court held that the panel had been mistaken in relying upon the ERISA violation to supply the wrongful motive for the ADEA

violation; it said that pensions might often correlate with age but a firing to prevent pension vesting did not itself amount to a firing based upon age. Id. at 611-13, 113 S.Ct. at 1706-08.

The Supreme Court remanded the case to the panel to reconsider whether the jury had sufficient evidence to find an ADEA violation once the ERISA violation was put to one side. 507 U.S. at 614, 113 S.Ct. at 1708. On remand, the original panel reconsidered the ADEA claim. In a second opinion in October 1993, it ruled that even disregarding the ERISA violation, enough evidence of age discrimination remained to sustain the ADEA verdict, reduced and then doubled as before.

The Hazens then petitioned for rehearing en banc, arguing inter alia that the panel had misconstrued a pertinent Supreme Court decision issued shortly after its remand in this case, St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). After soliciting memoranda, the en banc court in June 1994 ordered a new trial on the ADEA count, concluding that the verdict on this count had been contaminated by the same mistake that had led the Supreme Court to vacate the original panel decision.

Biggins unsuccessfully sought rehearing and then petitioned the Supreme Court for review, arguing that the en banc court had no power to order a new trial and that the decision to do so violated the Supreme Court's mandate. The Supreme Court denied certiorari. In re Biggins, 513 U.S. 1013, 115 S.Ct. 614, 130 L.Ed.2d 523 (1994). In April 1996, the district court held a new two-week jury trial on the ADEA count. The jury returned a verdict for the Hazens.

After various post-trial motions, Biggins filed the appeal

now before us; a cross-appeal was filed by the Hazens relating only to attorney's fees. We begin with the attacks by Biggins upon the en banc court's remand for a new trial, and then address his claims of error in the second trial. Attorney's fees issues, raised by the Hazens' cross-appeal, are considered at the close.

II.

Biggins' challenge to the en banc order requiring a new trial is, strictly speaking, addressed to the wrong bench. The arguments that the remand was unlawful or unsound were presented to the en banc court in a petition for rehearing, rejected there, and then presented in a petition for certiorari which the Supreme Court denied. It is not open to the panel, in the normal case, to reconsider issues decided earlier in the same case by the en banc court. See United States v. DeJesus, 752 F.2d 640, 642-43 (1st Cir.1985).

Nevertheless, it may be helpful to explain why Biggins' arguments relating to authority of the en banc court are mistaken. His constitutional argument amounts to this: first, the Seventh Amendment prohibits any federal court from reexamining jury findings "otherwise . . . than according to the rules of common law;" and second, in Biggins' view, the en banc court's new trial order overturned the jury findings of age discrimination — without any identified legal error committed by the district court.

This last qualification is critical. Where there is legal error, appeals courts often overturn jury verdicts, and order new trials or even dismissal. This occurs, for example, where evidence has been wrongly admitted, or where an instruction was mistaken, or even where the evidence did not permit a reasonable jury to reach the verdict rendered. See 9A C. Wright & A. Miller,

Federal Practice and Procedure § 2540 (2d ed.1995); 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2805 (2d ed.1995).

The en banc court did find prejudicial legal error in the conduct of the original trial. The court's appraisal, as noted earlier, was that the jury was potentially misled by the same error that the Supreme Court identified in the first panel decision, namely, a belief that the wrongful motive (pension interference) that gave rise to an ERISA violation by itself constituted wrongful motive under ADEA. Whether or not the en banc court's assessment of prejudice was invincibly supported, the en banc court was free under the Seventh Amendment to make that judgment. [FN2]

> FN2. The concern did not come out of the blue. Biggins had relied in his complaint upon the deprivation of pension benefits as an act of age discrimination and had made the same argument on appeal.

Biggins' other challenge to the en banc court's authority is also wide of the mark. He argues that when the Supreme Court remanded the case to this court, it precluded this court from taking any action other than an up-or-down vote as to whether enough evidence remained to support the ADEA verdict. Therefore, says Biggins, the en banc court has violated the Supreme Court's mandate.

Of course, a higher court's mandate must be respected, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168, 59 S.Ct. 777, 780-81, 83 L.Ed. 1184 (1939), but the issue here is the scope of the mandate. Where as here a judgment is vacated and the

manner remanded, Hazen Paper Co., 507 U.S. at 617, 113 S.Ct. at 1710, the lower court must undo the judgment just vacated and cannot normally revisit a legal issue actually decided by the reviewing court. But after that, the situation is less rigid than Biggins assumes.

On remand, courts are often confronted with issues that were never considered by the remanding court. And

> although the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it 'leaves to the [lower] court any issue not expressly or impliedly disposed of on appeal.' Stevens v. F/V Bonnie Doon, 731 F.2d 1433, 1435 (9th Cir.1984).

Nguyen v. United States, 792 F.2d 1500, 1502 (9th Cir.1986). Broadly speaking, mandates require respect for what the higher court decided, not for what it did not decide. [FN3]

> FN3. See also Rogers v. Hill, 289 U.S. 582, 587-88, 53 S.Ct. 731, 734, 77 L.Ed. 1385 (1933) (absent a contrary direction, a district court on remand can permit the plaintiff to 'file additional pleadings, vary or expand the issues. . . .'); Sierra Club v. Penfold, 857 F.2d 1307, 1311-12 (9th Cir.1988); Alter Fin. Corp. v. Citizens & Southern Int'l Bank, 817 F.2d 349 (5th Cir.1987).

Here, the en banc court concluded that the contamination of the ADEA verdict required a new trial, even assuming that the remaining evidence might otherwise support a verdict for

Biggins on that claim. Whether this judgment was right or wrong — and we cannot revisit it — the contamination issue had certainly not been addressed in the Supreme Court's opinion. And when Biggins made his mandate argument on certiorari, the Supreme Court denied the petition.

III.

The next chain of error presents the most difficult issue in the case. Prior to the start of the second trial, motions in limine were filed by both sides. One such motion, filed by Biggins, invoked collateral estoppel and asked that the Hazens be barred from relitigating issues decided in the first trial on counts other than the ADEA claim. Specifically, Biggins asked that the Hazens be precluded at trial from showing or arguing (and we quote):

> — that the plaintiff was not fired, but left work voluntarily,
>
> — and/or that the plaintiff was fired because he was a disloyal employee,
>
> — and/or that the plaintiff's disloyalty created a need for the defendants to dictate that he sign a restrictive agreement.

In a second in limine motion, Biggins asked that the Hazens also be precluded from showing or arguing that Biggins was seeking additional compensation when, in Spring 1986, he conditioned his signing of the confidentiality agreement on being

given stock. Biggins claimed that the first trial had determined that he had been promised the stock in 1984 and that the company had been found liable for fraud in withholding the stock.

The district judge rejected both in limine motions after an oral hearing, expressing some doubt but concluding that the en banc court had intended a full new trial on the ADEA count. The judge said (and Biggins readily agreed) that it could make the new trial an empty gesture if the jury were told that Biggins was an innocent victim who had been fired by the Hazens as part of an effort to defraud Biggins. The court did instruct the jury that Biggins had been fired and had not resigned.

Collateral estoppel, now often called issue preclusion, prevents a party from relitigating at a second trial issues determined between the same parties by an earlier final judgment — subject to various limitations. Lundborg v. Phoenix Leasing, Inc., 91 F.3d 265, 271 (1st Cir.1996); Restatement (Second) of Judgments § 27 (1982). But the limitations have been slowly diluted over time and most are irrelevant here. Nor do the Hazens dispute that the jury verdict in favor of Biggins at the first trial is now final except on the ADEA count.

The Hazens' main argument against collateral estoppel has been that the "issues" in the two cases were different because nothing in the first trial validly determined that the Hazens had been motivated by age in firing Biggins (since the Supreme Court had vacated this claim). This won't wash. True, age motivation is usually the ultimate issue under the ADEA; but collateral estoppel is no longer limited to ultimate issues: necessary intermediate findings can now be used to preclude relitigation. Grella v. Salem Five Cent Savings Bank, 42 F.3d 26, 30-31 (1st Cir.1994); Restatement (Second), Judgments § 27, comment j. (1982).

Appendix B

Often it is very difficult to prove that the initial trial necessarily decided an intermediate issue. But in this case the special verdict form and reasonable inference indicates that several "facts" were determined by the jury on counts other than ADEA: (1) that Biggins was fired, (2) that the stock had been promised to him, and (3) that (in the words of the verdict form) "defendants wrongfully discharged plaintiff in order to deprive plaintiff of the promised stock compensation. . . ."

At the new trial, the jury was instructed that Biggins had been fired, so that is out of the case. But on the second issue Biggins says that the Hazens relitigated the issue of whether they had promised him stock, and that appears to be the case. A good argument can be made that under standard collateral estoppel doctrine, the Hazens should not have been allowed to relitigate the issue whether "in fact" Thomas Hazen had promised the stock to Biggins, a point about which both Biggins and Hazen told largely inconsistent stories.

Yet if there was error, we regard it as harmless. Whether the stock was promised has little relevance to the question whether the Hazens engaged in age discrimination when they fired Biggins. Biggins argues that the Hazens purported to fire him because he refused to sign the confidentiality agreement and therefore the stock promise was relevant, Biggins having offered to sign in exchange for the promised stock. But Biggins' refusal to sign does not vanish as a plausible motive for the Hazens, regardless of whether stock was wrongly withheld.

Obviously the Hazens wanted to relitigate the stock-promise issue, and Biggins to foreclose relitigation, because the Hazens look worse — from the standpoint of character — if they were welshing on a promise and Biggins looks worse if he were

making new demands. But character evidence is not normally admissible to show conformity therewith. Fed.R.Evid. 404(a). Thus, the permissible use of the evidence about the promise was very limited so far as the ADEA claim was concerned; properly used, it added useful context, nothing more.

Turning to the third "fact" in issue, we reject Biggins' claim that the jury should have been told that the Hazens fraudulently discharged Biggins to deprive him of promised stock. How such an instruction would be understood is unclear: the Hazens say that (by supplying a different motive) it cuts against Biggins' current claim that he was discharged on account of age; on the other hand, Biggins would obviously have liked the new jury to hear the terms "fraud" and "wrongful discharge" as a dual motive.

The problem the jury confronted on retrial was to sort out any age discrimination motive in the tangle of other possible motivations, including perceived disloyalty, compensation quarrels, and the like. We think that it would badly distort matters to tell the jury that in carrying out this task, it must accept that the Hazens' motivation in firing Biggins was wrongful or fraudulent. The glare from such an instruction would distort any effort to distinguish shadows or shades in the Hazens' actual motivation. See Fed.R.Evid. 403 [FN4]

> FN4. Biggins also argues that the second jury should have been told that at the prior trial, Biggins had been found to be loyal. There is no indication from the special verdict that the first jury made a generic finding of "loyalty."

In sum, there was no prejudicial error in this challenged

refusal to apply collateral estoppel. We thus need not decide whether, even on the opposite assumption, it would make any sense to reverse here. After all, the issues have now been relitigated, collateral estoppel is a doctrine of judicial economy, and one might wonder whether — assuming no other error-such an objective would be served by a third trial. Cf. Lama v. Borras, 16 F.3d 473, 476 n. 5 (1st Cir.1994) (court of appeals will not review denial of summary judgment motion after a full trial and an adverse jury verdict).

IV.

In addition to the two large claims of error — the attack on the en banc order and the collateral estoppel claim — Biggins makes six shorter claims of trial error and also seeks to resurrect the contract claim found insufficient by the first panel opinion. Only the contract claim and one of the six claimed trial errors require any discussion: the other alleged errors are fairly raised but are answered by the Hazens and are of no general interest.

Biggins' strongest claim of error, which we do address, is that the district court on retrial erred by excluding evidence of his pension status and the Hazens' effort to deprive Biggins of his unvested pension plan benefits upon termination. Biggins says that without this information, the jury was misled by the Hazens' effort at the second trial to portray the company as a generous employer willing to provide such benefits for Biggins.

The Hazens argue that the attempted pension termination is irrelevant: they say that Biggins can collect only once for the wrongful termination of his pension, and this loss was compensated by the earlier award on the ERISA count. But that is beside the point: facts underlying one claim could be pertinent

to a different claim, regardless of whether the former claim had been satisfied. Still, the Hazens also argue that in this instance the Supreme Court expressly decided that interference with pension vesting is not age discrimination.

Actually, the Supreme Court reserved the possibility that pension evidence might occasionally be relevant where the employer is shown consciously to equate pension status with age, Hazen Paper Co., 507 U.S. at 612-13, 113 S.Ct. at 1707-08; but that is not Biggins' argument here. Rather, what Biggins wanted the jury to infer from the pension interference finding is that the Hazens are not as nice as they claim to be. Again, this is largely forbidden character evidence, although the trial court has some latitude since the evidence can also be treated as context.

Still, in regard to age discrimination, the Hazens' generosity vel non is at best marginally relevant. The district court had every reason to worry, in light of the Supreme Court and en banc decisions, that undue attention to pension termination would prompt yet another reversal. Even if some narrow path could have been followed — e.g., by limiting instructions — the district court was within its discretion in declining to do so. See United States v. Houlihan, 92 F.3d 1271 (1st Cir.1996), cert. denied, __ U.S. __, 117 S.Ct. 963, 136 L.Ed.2d 849 (1997).

Biggins' other claim relates to his post-verdict motion. Following the second trial, Biggins filed a motion to reopen the adverse judgment on the contract claim, relying upon Fed.R.Civ.P. 60 (b)(6), which permits the court to undo a final judgment. His claim was that a recent state decision undermined the panel's earlier rejection of the contract claim. The district court denied the motion.

Appendix B

To understand this Rule 60(b) claim, one must return to the original proceedings. In the first trial, the jury awarded Biggins about $267,000 on his breach of contract claim; Biggins claimed that the company's "employee handbook" comprised a contract under Jackson v. Action for Boston Community Development, Inc., 403 Mass. 8, 525 N.E.2d 411 (1988), and that protections it afforded against discharge had been denied to him. Jackson had held that "on proper proof, a personnel manual can be shown to form the basis of [such] an express or implied contract." 525 N.E.2d at 414.

On the first appeal, the panel set aside the contract claim award. The panel noted that there was no evidence that the handbook had been incorporated into a contract by negotiation or that either Biggins or the company had treated the handbook as a contract between them. 953 F.2d at 1423. The panel held that a judgment n.o.v. should have been granted and vacated the award. That disposition, like the several jury awards to Biggins that were not further challenged by the Hazens, became final.

In the Rule 60(b) motion, Biggins argued that a more recent decision of the state's highest court, O'Brien v. New England Telephone & Telegraph Company, 422 Mass. 686, 664 N.E.2d 843 (1996), conflicts with the panel's earlier treatment of the contract issue in 1992. We agree that the panel's disposition of the contract claim might have been different had O'Brien been decided earlier: its tone and language are more favorable to such recoveries than Jackson. While there is no direct contradiction, O'Brien is a gradual extension of precedent (Jackson was itself an extension of an earlier case) typical of common-law jurisprudence.

Yet the case law is very hostile to using a mistake of state

law, still less a change in state common law, as grounds for a motion to reopen a final judgment under Rule 60(b)(6). Although the door is not quite closed, cf. Polites v. United States, 364 U.S. 426, 433, 81 S.Ct. 202, 206-07, 5 L.Ed.2d 173 (1960), there is good sense — as well as much precedent — to make this the rarest of possibilities. [FN5] Decisions constantly are being made by judges which, if reassessed in light of later precedent, might have been made differently; but a final judgment normally ends the quarrel.

> FN5. See, e.g., Batts v. Tow-Motor Forklift Co., 66 F.3d 743, 750 (5th Cir.1995), cert. denied, __ U.S. __, 116 S.Ct. 1851, 134 L.Ed.2d 951 (1996); Overbee v. Van Waters & Rogers, 765 F.2d 578, 580 (6th Cir.1985); Seese v. Volkswagenwerk A.G., 679 F.2d 336, 337 (3d Cir.1982).

Indeed, the common law could not safely develop if the latest evolution in doctrine became the standard for measuring previously resolved claims. The finality of judgments protects against this kind of retroactive lawmaking. Admittedly, there is some arbitrariness (e.g., "new law" is applied in cases still on direct appeal); but, by the same token, Jackson itself had not been decided when the Hazens first handed out their employee handbook.

Biggins says that the abuse of discretion standard under Rule 60(b) should not shield the district court in this case, since that court may have thought itself disabled from reconsidering the panel's holding on the contract award. But absent extraordinary circumstances, we would think it dubious practice to reopen a final judgment under Rule 60(b)(6) solely because of later precedent pointing in a different direction. The fact that

a different claim in this case is still alive does not comprise an extraordinary circumstance.

The Hazens' cross-appeal is a challenge to the district court's award of attorney's fees. To understand the issues requires us to retrace several steps, beginning again with the first trial. After that trial, the district court in two stages awarded Biggins a total of about $207,000 in fees (plus costs), reflecting Biggins' success on both the ADEA and the ERISA claims.

Attorney's fees are mandatory for the successful plaintiff under the ADEA and permissible under ERISA, see 29 U.S.C. § 626(b); 29 U.S.C. § 1140; as to the latter, the district court exercised its discretion in favor of an award. No such fees were available for the common-law claims on which Biggins recovered substantial damages, namely, fraud and discharge in violation of contract. The award for the two federal claims was based upon straight time and upon hourly rates not now in issue.

After the first panel opinion, Biggins — having successfully defended his verdicts on both federal claims — sought an additional award of attorney's fees and costs for appellate work. In March 1992, the panel awarded Biggins additional fees of just under $72,000. There followed the Supreme Court remand of the ADEA claim and the second panel opinion where Biggins, again successful on that claim, sought further attorney's fees in November 1993.

However, in June 1994, the en banc court vacated the ADEA award, ordering a new trial. In a companion order, the panel declined to award any additional fees for the first appeal, as sought by Biggins, and said that the remainder of Biggins' application for additional fees had been rendered moot by the

en banc order. The case then returned to the district court where the new trial occurred in April 1996.

After the second trial, Biggins sought to execute judgment on the prior awards of attorney's fees (just over $207,000 for the first trial and almost $72,000 for the first appeal). The Hazens, by contrast, moved under Fed.R.Civ.P. 60(b)(5) to reopen the judgment and reduce the previously awarded fees because Biggins was no longer the prevailing party on the ADEA claim. In July 1996, the district court resolved the matter in a detailed memorandum, pointing out that he was "intimately familiar" with the case.

The district judge agreed with the Hazens that the fee award resulting from the first trial should be reexamined, since one predicate (the ADEA award) had now been undone. See Mother Goose Nursery Schools, Inc. v. Sendak, 770 F.2d 668, 676 (7th Cir.1985), cert. denied, 474 U.S. 1102, 106 S.Ct. 884, 88 L.Ed.2d 919 (1986). But the district judge disagreed with the Hazens that a drastic reduction was warranted. He concluded that subtracting the ADEA claim from the first trial would not have substantially reduced the amount of time needed to prepare and try the ERISA claim on which Biggins had conclusively prevailed. He ruled that a 20 percent reduction was warranted and awarded 80 percent of the original $207,000 figure to cover the original trial.

The district court declined to alter the panel's award of almost $72,000 for the first appeal; that appeal, it will be remembered, had resulted in affirmance of the ADEA and ERISA awards, but the ADEA award had later been undone. The district court said that this court had likely considered the matter of a reduction when it remanded for a new trial, and in any case, that award was the court of appeals' business.

Appendix B

Accordingly, the district court entered a revised judgment covering the entire attorney's fees award in both courts. The total is about $237,700, apart from costs. It is from this judgment that the Hazens have now cross-appealed, objecting both to the modesty of the 20 percent reduction in the district court fee and the refusal to reduce at all the amount awarded by this court for appellate work.

The district judge's refusal to order more than a 20 percent reduction is easily sustained. Most of this case has focused throughout on a central event, Biggins' firing, in an effort to appraise the Hazens' reason or reasons; but motivation had to be discerned through examination of several controversies that had enveloped the parties and led up to the firing, including Biggins' other ventures and claim to stock ownership.

A trial of the firing and related background events would have been quite extensive, and probably pretty similar in contour, even if Biggins had brought only one of the two federal claims. Indeed, the second trial was nominally limited to the ADEA claim, but its duration and breadth were considerable. The commonality of issues has already been noted, in the Hazens' favor, sustaining their evidence as to background matters in the second trial.

In all events, the Hazens make no effort to show in detail that the 20 percent reduction understates the time savings from (hypothetically) eliminating the ADEA claim from the first trial. Instead, they rely mainly upon doctrine, namely, that where

> a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times

> a reasonable hourly rate may be an excessive amount. . . . even where the plaintiff's claims were interrelated. . . .

Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983).

We say "mainly" because the Hazens also try to make use of Biggins' earlier attempt, in resisting a remand, to minimize the importance of the ERISA claim in the first trial. It is true that Biggins called the claim little more than "a blip on the screen" but, of course, the en banc court disagreed with him. Catching up counsel on past rhetoric is sometimes fair, but not in the present situation where the "blip" argument was so clearly unsuccessful exaggeration.

This brings us back to Hensley. Of course, it is sometimes appropriate to discount for failed or non-compensable claims where they cannot be neatly segregated from a successful compensable one. But the district court did discount by 20 percent for the failed ADEA claim; and it took the original $207,000 award as already reduced to account for time spent on state claims that would not have been needed for the federal claims. The former adjustment is obvious; and if the latter assumption is an error, the Hazens have not shown it.

Finally, we come to the district court's refusal to reduce the award of almost $72,000 made by this court for the first appeal. Biggins says that this award is no longer open because the Hazens did not ask for a reduction at the time of the remand; the Hazens say, we think with some justification, that such a reduction request would have been premature since the possibility remained that Biggins would still prevail on the ADEA claim at the second trial.

But this court is not inclined to reopen its earlier $72,000 award. In theory, the Hazens have a claim that time spent on the first appeal as to the ADEA issue — among a considerable number of other issues — ought to be subtracted. But one may doubt, at least here, whether much discernable cost is added by writing more pages in an appellate brief, to address one more issue with which counsel is already familiar after an extensive trial.

In refusing to reopen the earlier award, we also take into account two other factors: that the original panel earlier refused to enlarge Biggins' award, despite his offer of further time records, and that this panel has no intention of making a further award to Biggins for time he has just spent in defending his attorney's fee judgment (although it too could be the subject of an award in this court's discretion). From our standpoint, this case is now over.

Affirmed.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AUGUST 10, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

WALTER F. BIGGINS,

Plaintiff-Appellee,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellants.

No. 91-1614

WALTER F. BIGGINS,

Plaintiff-Appellant,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellees.

BEFORE

TORRUELLA, Chief Judge,
BOWNES, Senior Circuit Judge,
SELYA, CYR, BOUDIN AND STAHL, Circuit Judges.

Appendix C

ORDER OF COURT

Entered: August 10, 1994

Upon consideration of plaintiff-appellee's petition for rehearing,

It is ordered that said petition be denied.

By the Court:
s/ FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Harrington and Egan]

APPENDIX D — ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JUNE 27, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

WALTER F. BIGGINS,

Plaintiff-Appellee,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellants.

No. 91-1614

WALTER F. BIGGINS,

Plaintiff-Appellant,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellees.

ORDER OF COURT

Entered: June 27, 1994

Appendix D

The order of the en banc court of June 27, 1994 having withdrawn the panel opinion, this court's judgment of October 18, 1993 is vacated.

The judgment of this court is now entered in accordance with this court's panel order of June 27, 1994 and in accordance with the en banc order of June 27, 1994.

By the Court:
s/ FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Harrington and Egan]

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

Walter F. Biggins,

Plaintiff, Appellee,

v.

The Hazen Paper Company, et al.,

Defendants, Appellants.

No. 91-1614

Walter F. Biggins,

Plaintiff, Appellant,

v.

The Hazen Paper Company, et al.,

Defendants, Appellees.

BEFORE
Torruella, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Tauro*, *District Judge*.

---

* Of the District of Massachusetts, sitting by designation.

Appendix D

PANEL ORDER

Entered June 27, 1994

Pursuant to the direction of the *En Banc* Court we issue the following order:

1. The finding of liability on the ERISA count is affirmed. A remittitur of $7,000 on the damages award of $100,000 is to be made.

2. The finding of liability on the wrongful discharge count and the award of one dollar in damages are affirmed.

3. The finding of liability on the fraud count and the damages award of $315,098 are affirmed.

4. The finding of liability on the breach of employment contract count is reversed. The damages award on that count of $266,987 is annulled.

5. We affirm the district court's grant of j.n.o.v. on the Massachusetts Civil Rights Act count. This means the jury award of one dollar in damages on that count is annulled.

6. The awards of prejudgment interest on the ERISA count and the wrongful discharge and fraud counts are affirmed.

7. The district court's refusal to enhance plaintiff's attorney's fees is affirmed.

8. Plaintiff filed fee applications in September and November of 1993. It separates the fees requested into five segments. The first

part is entitled: "Hours Expended Since Last Appellate Fee Application and Prior to Certiorari Petition to United States Supreme Court." The time expended runs from February 2, 1992, to March 24, 1992. The total fees requested amount to $16,293.50. On March 19, 1992, we awarded plaintiff $71,798.50 in appellate attorney's fees for the first appeal. This appeal involved a number of issues: three under the ADEA claim; the ERISA claim: four under the Massachusetts law claims; prejudgment interest; and attorney's fees. At the time we made our award we felt that it covered the time for the entire appeal. We do not think that plaintiff is entitled to any additional fees for the first appeal. We deny the request for additional fees in the amount of $16,293.50. The balance of the application has been rendered moot by the order of the *En Banc* Court.

By the Court:
s/ Francis P. Scigliano
Clerk.

[cc: Messrs. Harrington, Gordon, Hayes, McGinley, Randall, Egan and Cahillane]

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

WALTER F. BIGGINS,

Plaintiff-Appellee,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellants.

No. 91-1614

WALTER F. BIGGINS,

Plaintiff-Appellant,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellees.

BEFORE

TORRUELLA, SELYA, CYR, BOUDIN, AND STAHL, Circuit Judges.*

---

* Chief Judge Breyer did not participate in the issuance of this order.

Appendix D

ORDER OF THE EN BANC COURT

Entered: June 27, 1994

The petition for rehearing en banc suggests that we rehear this case only with respect to plaintiff's age discrimination claim. After examining the record, the en banc court became concerned that the jury may well have taken negative account of the defendants' ostensible desire to deprive the plaintiff of a pension — a factor that the Supreme Court outlawed as a basis for the ADEA verdict, *see Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706-07 (1993). Consequently, the en banc court, pursuant to Fed. R. App. P. 35(a) & (b), directed that the parties show cause why the panel's opinion following remand, issued on October 18, 1993, should not be withdrawn, the panel holding numbered 1 (*see* Panel Op. at 12) vacated, a separate order entered to implement the panel holdings numbered 2 through 8 (*see* Panel Op. at 12-13), the judgment on the ADEA count vacated, and that count remanded for a full new trial.

The show-cause order issued on March 1, 1994. The court has now reviewed the memoranda filed by the parties in response to this show-cause order and has concluded that the likelihood of verdict contamination with respect to the count at issue is sufficiently great that the interests of justice require a full new trial on the age discrimination claim. Consequently, we hereby withdraw the panel opinion, vacate the judgment of this court pending reissuance of a revised panel opinion (*see infra*), vacate holding numbered 1 (*see* Panel Op. at 12) and that portion of holding numbered 7 that relates to prejudgment interest vis-a-vis the ADEA count (*see* Panel Op. at 13), remand the ADEA count for a full new trial, and direct the district court to vacate the judgment on the ADEA count, entered on April 12, 1991. Furthermore, we

direct the panel to reissue the remainder of its opinion (which the panel may elect to do by means of a summary order), the revised panel opinion to be filed on the same day as, but immediately after, this order. The panel also shall take whatever other action may be necessary or desirable to effectuate the remaining holdings therein contained.

We have considered and rejected plaintiff's request that, in respect to the ADEA count, we order a new trial limited to particular elements of liability. Furthermore, we deny plaintiff's contingent request that we also order a retrial of the wrongful discharge and fraud counts. We do not have jurisdiction over those claims (a) because no en banc review of them was sought in a timely fashion, and (b) more fundamentally, because, although plaintiff prosecuted a cross-appeal, he did not direct his notice of appeal to that part of the district court's judgment. *See* Fed.R.App.P. 3(c) (requiring, *inter alia,* that a notice of appeal "designate the judgment, order or part thereof appealed from"); *see also Smith v. Barry,* 112 S.Ct. 678, 682 (1992) ("Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review"); *Kotler v. American Tobacco Co.,* 981 F.2d 7, 10-11 (1st Cir. 1992) (similar).

The plaintiff's reliance on the Advisory Committee's comment following Rule 3 — to the effect that courts should "dispense with literal compliance in cases in which it cannot fairly be exacted" — is misplaced. This comment has been understood by the Supreme Court as only a narrowly limited directive to excuse "informality of form or title" in a notice of appeal, or other such "imperfect but substantial compliance with a technical requirement." *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 315 (1988). Thus, while it is true that "[n]oncompliance with 'mere technicalities' will not defeat appellate jurisdiction", *Kotler,* 981

F.2d at 11 (citation omitted), this principle only reigns when the litigant's action, though somehow defective, "is the functional equivalent of what the rule requires." *Torres*, 487 U.S. at 317.

The plaintiff's actions here, however, simply cannot be construed as effecting substantial compliance. The failure to take an appeal from the judgment vis-a-vis the wrongful discharge and fraud counts constitutes neither noncompliance with a mere technicality nor the functional equivalent of indicating an intention to appeal from the district court's disposition of those counts.

Nor is this a case in which, despite plaintiff's failure to designate the specific portions of the judgment for appeal, the paper that plaintiff did file provided adequate notice, in light of all the circumstances, of an intention to appeal anent the wrongful discharge and fraud counts. *Cf., e.g., Foman v. Davis*, 371 U.S. 178, 181 (1962) (holding that where plaintiff's first notice of appeal properly identified the judgment to be appealed, but was filed prematurely, plaintiff's second notice of appeal, which failed to designate the same judgment, was nonetheless effective).

Quite the opposite obtains in this situation: though plaintiff did file a cross-appeal, he limited it, by designation, to three of the district court's numbered holdings, none of which had anything to do with the wrongful discharge and fraud counts.

Because plaintiff's notice of appeal could not reasonably be interpreted as giving notice that plaintiff was appealing any of the other numbered holdings (including those which encompass the disposition of the claims for wrongful discharge and fraud), the defendants "were entitled to rely on the plain language and apparent purport of the notice [plaintiff] prepared and served." *Kotler*, 981 F.2d at 11; *see also Smith*, 112 S.Ct. at 682 (declaiming

that "the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal"). This reliance was all the more warranted since plaintiff's notice of appeal directed the defendants' attention to other specific rulings of the court below, (namely, numbered holdings 6, 7, and 9), but not to the wrongful discharge and fraud claims. Given this fact, straining to find adequate notice regarding the latter claims would involve not merely a liberal reading of Rule 3, but would require waiving the rule's jurisdictional requirements. No matter how the equities fall, we cannot take so iconoclastic a course. *See Torres*, 487 U.S. at 317.

By the Court:
s/ Francis P. Scigliano
Clerk

[cc: Messrs. Harrington and Egan]

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MARCH 1, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

WALTER F. BIGGINS,

Plaintiff-Appellee,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellants.

No. 91-1614

WALTER F. BIGGINS,

Plaintiff-Appellant,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants-Appellees.

BEFORE

BREYER, Chief Judge,
BOWNES, Senior Circuit Judge,
TORRUELLA, SELYA, CYR, BOUDIN AND STAHL, Circuit Judges.

Appendix E

ORDER OF COURT

Entered: March 1, 1994

The petition for rehearing en banc suggests that we rehear this case only with respect to plaintiff's age discrimination claim. Having examined the record, the en banc court is concerned whether the likelihood that the jury took negative account of the defendants' ostensible desire to deprive the plaintiff of a pension — a factor that the Supreme Court outlawed as a *basis* for the ADEA verdict, *see Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1705-07 (1993) — is sufficiently great that the interests of justice require a new trial on the age discrimination claim.

Consequently, the en banc court, pursuant to Fed. R. App. P. 35(a), (b), directs that the parties, within two weeks from the date of this order, show cause, if any there be, why the panel's opinion following remand, issued on October 18, 1993, should not be withdrawn, the panel holding numbered 1 (*see* Panel Op. at 12) vacated, a separate order entered to implement the panel holdings numbered 2 through 8 (*see* Panel Op. at 12-13), the judgment on the ADEA count vacated, and that count remanded for a full new trial.

Memoranda filed by the parties in response to this show-cause order shall be in the usual form and shall be limited to 10 pages per side.

By the Court:
Francis P. Scigliano
Clerk

[cc: Messrs. Harrington and Egan]

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED OCTOBER 18, 1993

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1591

WALTER F. BIGGINS,

Plaintiff, Appellee,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants, Appellants.

No. 91-1614

WALTER F. BIGGINS,

Plaintiff, Appellant,

v.

THE HAZEN PAPER COMPANY, ET AL.,

Defendants, Appellees.

ON REMAND FROM THE UNITED STATES
SUPREME COURT

Appendix F

Before
Torruella, *Circuit Judge,*
Bownes, *Senior Circuit Judge*
and Tauro,* *District Judge.*

John M. Harrington, Jr. with whom *Robert B. Gordon, Ropes & Gray, Richard S. Hayes, Patrick W. McGinley, Raymond R. Randall* and *Sullivan & Hayes* were on brief for Hazen Paper Company, et al.

John T. Egan with whom *Maurice M. Cahillane* and *Egan, Flanagan and Cohen, P.C.* were on brief for Walter F. Biggins.

October 18, 1993

BOWNES, *Senior Circuit Judge.* The Supreme Court has remanded this case to us "to reconsider whether the jury had sufficient evidence to find an ADEA violation." *Hazen Paper Co. v. Biggins,* 113 S. Ct. 1701, 1708 (1993). In order to properly assay the evidentiary record in this case, we must first examine the Court's opinion. The issue triggering the remand was "does an employer's interference with the vesting of pension benefits violate the ADEA?" *Id.* at 1705. The Court held that it did not.[1]

---

* Of the District of Massachusetts, sitting by designation

1. The Court also considered a second question:

> does the *Thurston* standard for liquidated damages apply to the case where the predicate ADEA violation is not a formal, facially discriminatory policy, as in *Thurston,* but rather an informal decision by the employer that was motivated by the employee's age?

Id. at 1705. It ruled that the *Thurston* standard did so apply and affirmed our holding to that effect. The *Thurston* issue is no longer a factor in the case.

Appendix F

In addition to finding ADEA liability, the jury also found that the defendants had violated ERISA by firing plaintiff in order to prevent his pension benefits from vesting. Although this finding was not before the court, it is referred to in the Court's opinion. The Court noted that we had found the evidence of pension interference sufficient for ERISA liability, and that we "also gave it considerable emphasis in upholding ADEA liability." *Id.* at 1707. It then quoted from our opinion:

> Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years.

Biggins v. Hazen Paper Co., 953 F.2d 1405, 1412 (1st Cir. 1992), *quoted in Hazen Paper*, 113 S. Ct. at 1704-05.

After distinguishing between "disparate treatment" and "disparate impact" theories of employment discrimination, the court discussed the legislative history and purpose of the ADEA statute and the pertinent case law. It then held "that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service." *Hazen Paper*, 113 S. Ct. at 1707-08. Following this holding the Court said:

Appendix F

Besides the evidence of pension interference, the Court of Appeals cited some additional evidentiary support for ADEA liability. Although there was no direct evidence of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect evidence: Respondent was asked to sign a confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. 953 F.2d at 1411. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision—here, that respondent had been disloyal to Hazen Paper by doing business with its competitors—is " 'unworthy of credence.' " *Aikens,* 460 U.S., at 716, 103 S. Ct., at 1482 (quoting *Burdine,* 450 U.S., at 256, 101 S. Ct., at 1095). But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. This issue is now before us in the Title VII context, see *Hicks v. St. Mary's Honor Center,* 970 F.2d 487 (CA8 1992), cert. granted, 506 U.S. __, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993), and we will not address it prematurely. We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation.

Id. at 1708.

The decision in *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742 (1993) followed hard on the heels of *Hazen Paper,* and that opinion forms part of the lens through which we must view the evidence "to reconsider whether the jury had sufficient evidence to find an ADEA violation." *Hazen Paper,* 113 S. Ct. at 1708.

St. Mary's involved a charge by an employee that his employer had demoted and then discharged him because of his race in violation of Title VII. After a bench trial, the judge found that the reasons given by the employer for its decisions were not its real reasons. Nonetheless, the court determined that the plaintiff/employee had not carried his burden of proving that race was a determinative factor underlying his employer's actions, and that the adverse employment decisions were not racially motivated, but based on personal animosity. On appeal the Eighth Circuit reversed, holding that where the trier of fact rejects an employer's proffered explanation, the court *must* enter judgment for the plaintiff. The Supreme Court confronted this issue and reversed.

In explaining its decisions the Court stated, *inter alia:*

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.[4] Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon

> such rejection, "[n]o additional proof of discrimination is *required*," 970 F.2d, at 493 (emphasis added). But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

St. Mary's, 113 S. Ct. at 2749 (emphasis in original).

> Footnote 4 states:
>
> > 4.. Contrary to the dissent's confusion-producing analysis, *post*, 2761-2762, there is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra*, at 2752, and (2) "it is not enough . . . to *dis*believe the employer," *infra*, at 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding a discrimination, *there must be a finding of discrimination.*

(Emphasis in original.)

We now turn to an analysis of the evidence to determine whether, absent the evidence of the employer's interference with

plaintiff's pension vesting, there was sufficient evidence for the jury to find age discrimination.

In disparate-treatment employment discrimination cases, courts follow the burden-shifting order of proof framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and reaffirmed in *Texas Dept. of Community Affiars v. Burdine*, 450 U.S. 248 (1981).

Under the *McDonnell Douglas* approach a plaintiff must first establish, by a preponderance of the evidence, a "prima facie" case of age discrimination. An ADEA plaintiff can make out a prima facie case by showing that he was a member of the protected group (*i.e.*, that he was over the age of 40); that his work product was satisfactory; and that he was discharged and replaced by someone with comparable qualifications. *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) (citing cases). A prima facie case raises a presumption of discrimination which, if not rebutted, will result in the entry of judgment for the plaintiff.

Once the plaintiff has made out the elements of a prima facie case, his employer must produce an explanation to rebut the presumption of discrimination raised by the prima facie case. *St. Mary's*, 113 S. Ct. at 2747. To do this the employer must come forward with evidence that its decision was made "for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S. at 254.

After the employer has articulated one or more legitimate, nondiscriminatory reasons for its actions, the shifted burden of production becomes "irrelevant" and " 'the presumption raised by the prima facie case is rebutted', and 'drops from the case.' ". *St. Mary's*, 113 S. Ct. at 2747 (quoting *Burdine*, 450 U.S. at 255 & n. 10).

At this point the burden shifts back to the plaintiff to demonstrate that his employer's proffered reasons were a pretext for age discrimination. *Id.*

There can be no question that plaintiff established a prima facie case with the following evidence:

> (i.) he was 62;
> (ii.) he met his employer's performance expectations;
> (iii.) he was discharged; and
> (iv.) he was replaced by another individual of similar skills and qualifications, thus confirming the defendants' continuing need for equivalent services.

See id. at 2746-47; *Vega v. Kodak Caribbean, Ltd.*, No. 93-1156, slip op. at 4 (1st Cir. Aug. 24, 1993); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979). This created the presumption that "the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S. at 254. The employer here—Hazen Paper—introduced evidence that the reason for plaintiff's discharge was that he had entered into two businesses with his son which involved a great risk that plaintiff would disclose company secrets to its competitors. The owners of Hazen Paper, Thomas and Robert Hazen, felt that plaintiff was not a loyal employee. There was also evidence of a continuing dispute between plaintiff and his employer over pay. Plaintiff felt that he was grossly underpaid and made repeated requests for an increase in pay. He testified that in July of 1984, Hazen Paper, through Thomas Hazen, promised to make up the difference between plaintiff's salary of $44,000 and the $100,000 plaintiff wanted by giving him stock in the company. Thomas Hazen emphatically denied making such a promise.

Appendix F

The jury rejected the company's rebuttal evidence. It found on the ERISA claim that plaintiff was discharged with the specific intent of interfering with his pension vesting. The jury also found on the state law claim of wrongful discharge that the company had agreed to compensate plaintiff with shares of its stock and that it wrongfully discharged plaintiff in order to deprive him of the promised stock. The jury further found that this constituted common law fraud under the Massachusetts law.

Our review of the record has not resulted in finding any more evidence on age discrimination than originally pointed out in our original opinion. We do, however, now flesh it out.

The plaintiff, Walter Biggins, at age sixty-two, was replaced by a man at least twenty years younger. Biggins' testimony at Volume I, page 152 of the record is that he was replaced by a man in his late thirties or early forties.

The confidentiality agreement of plaintiff's replacement provided more favorable severance and non-competition terms than were offered to plaintiff. *See* T. Hazen's Testimony at Vol. IV, p. 92; Plaintiff's Ex. 10 (Biggins' Agt.); Plaintiff's Ex. 25 (Replacement's Agt.). This evidence was beyond cavil.

The three younger employees in plaintiff's department, all in their thirties, were never asked to sign confidentiality agreements. *See* Biggins' Testimony at Vol. I, pp. 121-23.

We have omitted from consideration two comments by defendants about age. The Court described these as "isolated," *Hazen Paper,* 113 S. Ct. at 1708; we agree that they do not add to plaintiff's case.

Appendix F

In reconsidering the evidence, we are guided by the Court's teachings in *Hazen Paper* and *St. Mary's*. Our starting point is the Court's statement in *St. Mary's*.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

113 S. Ct. at 2749 (emphasis in original).

In the instant case there can be no doubt that plaintiff established a prima facie case and that the jury disbelieved the reasons put forward by the defendants. And there is evidence from which it could be inferred that the disbelief of the jury was accompanied by a suspicion of mendacity: (1) on the state law claim of wrongful discharge the jury found that defendants had agreed, in 1984, to compensate plaintiff with shares of Hazen Paper Company stock and that defendants wrongfully discharged plaintiff in order to deprive him of the promised stock compensation; and (2) the jury also found that this constituted common law fraud under Massachusetts law.

We recognize, of course, that the plaintiff must show both that the employer's reasons were false and that discrimination was the real reason; there must be a finding of discrimination. *Id.* at n.4. The question, therefore, is whether there was evidence from which a finding of discrimination could be made.

Appendix F

In *Hazen Paper* the Court directly commented on the evidence of age discrimination in addition to that of pension interference:

> Besides the evidence of pension interference, the Court of Appeals cited some additional evidentiary support for ADEA liability. Although there was no direct evidence of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision—here, that respondent had been disloyal to Hazen Paper by doing business with its competitors—is " 'unworthy of credence.' "

113 S. Ct. at 1708 (citations omitted). It is true that the Court also stated:

> But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present.

Id. The Court, however, refused to address this issue and left its resolution to *St. Mary's*. *Id.*

Appendix F

Because the jury must have found that Hazen Paper's explanation for its decision — that plaintiff had been a disloyal employee — was "unworthy of credence," the indirect evidence was sufficient for the jury's finding of discrimination. In other words, plaintiff has met his burden of proving discrimination: he proved a prima facie case; the jury disbelieved the employer's reasons for discharging the plaintiff; and the plaintiff met his ultimate burden of persuasion by adducing additional admissible evidence of age discrimination. *See St. Mary's*, 113 S. Ct. at 2742.

Reading *Hazen Paper* and *St. Mary's* in tandem compels us to conclude that, absent any evidence of interference with the vesting of plaintiff's pension, there was sufficient evidence for the jury to find an ADEA violation.

We therefore re-affirm and adopt the findings made in our prior opinion, *Biggins v. Hazen Paper Co.*, 953 F.2d at 1428-29, affirming in part and reversing in part the judgment of the district court.

1. We uphold the finding of liability on the ADEA count. We find, as a matter of law, that the violation was willful. The damages are reduced from $560,775 to $419,454.38. Because this was a willful violation that amount is doubled to $838,908.76.

2. We uphold the finding of liability on the ERISA count. We order remittitur of $7,000 on the damages award of $100,000.

3. We uphold the finding of liability on the wrongful discharge count. We leave undisturbed the award of one dollar in damages.

4. We uphold the finding of liability on the fraud count and affirm the damages award of $315,098.

5. We reverse the finding of liability on the breach of employment contract count. The damages award on that count of $266,897 in annulled.

6. We affirm the district court's grant on j.n.o.v. on the Massachusetts Civil Rights Act count. This means the jury award of one dollar in damages is annulled.

7. No prejudgment interest can be awarded on the ADEA count. We uphold the awards of prejudgment interest on the ERISA count and the wrongful discharge and fraud counts.

8. We affirm the district court's refusal to enhance plaintiff's attorney's fees.

Remanded for further proceedings consistent with our prior opinion and the opinion of this date.

Costs on appeal awarded to plaintiff.

APPENDIX G — ORDER OF THE SUPREME COURT OF THE UNITED STATES DATED APRIL 20, 1993

SUPREME COURT OF THE UNITED STATES

No. 91-1600

HAZEN PAPER COMPANY, ET AL.,

Petitioners

v.

WALTER F. BIGGINS,

Respondent

ON WRIT OF CERTIORARI to the United States Court of Appeals for the First Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and that this cause is remanded to the United States Court of Appeals for the First Circuit for further proceedings in conformity with the opinion of this Court.

IT IS FURTHER ORDERED that the petitioners Hazen Paper Company, et al. recover from Walter F. Biggins Five Thousand Six Hundred Five Dollars and Seventy-Three Cents ($5,605.73) for their costs herein expended.

April 20, 1993

Printing of record:	$ 5,305.73
Clerk's costs:	300.00
Total:	$ 5,605.73

APPENDIX H — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED APRIL 5, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 88-0025-F

WALTER F. BIGGINS,
PLAINTIFF,
v.
THE HAZEN PAPER COMPANY,
ROBERT HAZEN AND
THOMAS HAZEN,
DEFENDANTS.

MEMORANDUM AND ORDER

April 5, 1991

FREEDMAN, C.J.

I. INTRODUCTION

On February 16, 1986, plaintiff Walter P. Biggins commenced this action against defendants Hazen Paper Company, Robert Hazen and Thomas Hazen ("defendants" or "the Hazens"), alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), Massachusetts tort and contract law, and the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H, 11I ("MCRA"). A jury found in favor of plaintiff on six of the eight counts in his complaint, and awarded plaintiff substantial damages. After the verdict, both parties submitted post-trial motions.

Four motions, two by plaintiff and two by defendants, are now before the Court. First, defendants have filed a

motion, pursuant to Fed. R. Civ. P. 50(b), for judgment notwithstanding the verdict or, in the alternative, for a new trial. Second, defendants have filed a motion to amend or alter the judgment pursuant to Fed. R. Civ. P. 59(e). Plaintiff opposes these motions.

Third, plaintiff has moved for an award of costs and attorney's fees under provisions of federal and state law. Fourth, plaintiff has filed a motion to compel defendants to increase the amount of the bond that secures plaintiff's judgment during the pendency of the post-trial motions. Defendants oppose plaintiff's motions.

For the reasons stated below, the Court orders judgment notwithstanding the verdict with regard to liquidated damages and the MCRA claim. The Court denies defendants' motion for judgment notwithstanding the verdict or new trial in all other respects. The Court also denies defendants' motion to alter or amend the judgment. The Court grants plaintiff's motion for attorneys' fees in the amount of $175,564.75, and for costs in the amount of $9,760.07. Finally, the Court denies plaintiff's motion to increase the amount of the bond.

II. PRIOR PROCEEDINGS

On July 20, 1990, after one week of trial, a jury of six returned a verdict in favor of plaintiff on six of the eight counts at issue.[1] On Count I, the jury awarded plaintiff $560,775.00 in actual damages under the ADEA, and also found that defendants had wilfully violated the ADEA. On Count II, the jury found that defendants' conduct constituted a violation of ERISA, and awarded $100,000.00 in damages. The jury also awarded plaintiff $1.00 in damages on Count IV for wrongful discharge, $315,098.00 on Count V for fraud, $1.00 on Count VII for a

[1] The jury found in favor of defendants on Counts III (declaratory judgment) and VI (conversion). Because none of the parties have objected to these parts of the verdict, Counts III and VI are not at issue, and the Court will not discuss them.

violation of MCRA, and $266,897.00 on Count VIII for breach of contract. Thus, the jury awarded plaintiff a total of $1,242,772.00.

Subsequent to the verdict, plaintiff filed a motion for an award of liquidated damages. On August 24, 1990, the Court granted plaintiff's motion, based solely on the jury's finding of willfulness and the text of the ADEA. 29 U.S.C. § 626(b); *Biggins* v. *Hazen Paper Co., et al*, Civ. Action No. 88-0025-F, Memorandum and Order (August 24, 1990). Thus, the Court awarded to plaintiff, in addition to the damages awarded by the jury, liquidated damages in an amount equal to the actual damages awarded by the jury on the ADEA claim, that is, $560,775.00. The Court deliberately offered no opinion as to the weight or sufficiency of the evidence with regard to any of the jury's findings. "[T]he Court will withhold its decision as to sufficiency of the evidence, on the question of willfulness as well as on other portions of the verdict, until after judgment is entered." *Id.* at 3-4.

The Court ordered the clerk to enter judgment consistent with the jury verdict and the Court's decision on the liquidated damages question. *Id.* at 4. On August 27, 1990, the clerk entered judgment in the amount of $1,803,547.00, with interest on the ERISA and state law claims in the sum of $196,641.35. Defendants' total liability as of the date of judgment, therefore, was $2,000,188.35.

The Court ordered the clerk to issue an execution on November 7, 1990. Upon issuance of the execution, defendants filed a bond in the amount of $2,100,000.00 to stay execution of judgment pending the Court's disposition of post-trial motions. Defendants having provided security, plaintiff has refrained from execution pending the Court's determination of the pending motions.

Appendix H

III. DISCUSSION

A. *Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial*

Defendants seek judgment notwithstanding the verdict, or in the alternative, a new trial on each count on which plaintiff prevailed. Fed. R. Civ. P. 50(b). The Court will first address defendants' arguments for judgment notwithstanding the verdict, and then proceed to the new trial arguments.

1. Judgment Notwithstanding the Verdict

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict . . . or by judgment notwithstanding the verdict." *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479-80 (1943). The Court will grant a party's motion for judgment notwithstanding the verdict only if, viewing evidence and reasonable inferences in a light most favorable to the non-moving party, reasonable people would nonetheless find in the movant's favor. *Jordan* v. *United States Lines, Inc.*, 738 F.2d 48; 49 (1st Cir. 1984)(citations omitted); *accord deMars* v. *Equitable Life Assurance Society*, 610 F.2d 55, 57 (1st Cir. 1979). "This Court will not grant a judgment notwithstanding the verdict unless the jury's verdict is untenable under any reasonable assessment of the evidence adduced at trial." *Refuse & Environmental Systems, Inc.* v. *Industrial Services of America*, 732 F. Supp. 1209, 1222 (D. Mass. 1990)(Freedman, C.J.).

a. Count I: Age Discrimination in Employment

In order to prevail under the ADEA, a plaintiff must prove that his employer fired him because of his age, that is, that plaintiff's age was "the determinative factor in his discharge." *Freeman* v. *Package Machinery Co.*, 865 F.2d 1331; 1335 (1st Cir. 1988); *Loeb* v. *Textron, Inc.*, 600 F.2d 1003; 1019 (1st Cir.

1979). To properly state a claim under the ADEA, a plaintiff must first establish a *prima facie* case of age discrimination. A plaintiff must show that he was within the protected age group; that he was fired; that he was qualified for the position and performed his job adequately; and that he was replaced by a person with qualifications similar to his own, thus evidencing the employer's continued need for the same skills. *Hebert* v. *Mohawk Rubber Co.*, 872 P.2d 1104, 1110 (1st Cir. 1989); *Freeman*, 865 F.2d at 1335.

Proof of plaintiff's *prima facie* case creates an inference of age discrimination, and places on the employer a burden of articulation or production. While the burden of proof remains at all times with the plaintiff, the employer, having been presented with an inference of discrimination, bears the burden of articulating a valid, non-discriminatory reason for the firing. *Freeman*, 848 F.2d at 1335.

If the employer produces a legitimate reason for the firing, "the initial presumption of age discrimination is dissolved and plaintiff must respond by showing that the reasons presented by the defendant are merely pretextural." *Hebert*, 872 F.2d at 1111; *Freeman*, 865 F.2d at 1336. Plaintiff must "prove by a preponderance of the evidence that the defendant's true motive was age discrimination." *Menard* v. *First Security Services Corp.*, 848 F.2d 281, 285 (1st Cir. 1988). Thus, in the end, a plaintiff must prove that the employer's alleged reasons for discharging plaintiff were fictitious and designed merely to mask age discrimination. *Freeman*, 865 F.2d at 1336.

The record plainly indicates that plaintiff established a *prima facie* case, and defendants do not appear to dispute this. Rather, the Hazens contend that they fired plaintiff because of plaintiff's disloyalty and his refusal to sign a legitimate confidentiality agreement. Defendants point to plaintiff's involvement with other businesses competing in the paper industry as evidence of plaintiff's disloyalty. In short, defendants argue that they had a valid, non-discriminatory reason for discharging plaintiff, that the record contains overwhelming evidence

in their favor, and that the jury verdict to the contrary lacks evidentiary support. The Court disagrees, and now holds that plaintiff offered evidence sufficient to sustain his burden of proof under the ADEA. Thus, the jury verdict as to age discrimination must stand.

Plaintiff offered the following as evidence of age discrimination. Plaintiff testified that defendants presented him with a confidentiality agreement, and that plaintiff would have had to sign the agreement in order to keep his job. Trial Transcript, Volume I at 114.[1] Plaintiff alleged that other, younger Hazen Paper employees did not have to sign such an agreement. Plaintiff further testified that the agreement did not provide for severance pay for plaintiff. However, when defendants hired a younger employee, one McDonald, to replace plaintiff, Mr. McDonald was offered a confidentiality agreement that provided for 100 days of separation pay. Further, Mr.McDonald's confidentiality agreement included a six-month noncompetition clause, whereas plaintiff's agreement contained a two-year non-competition clause. 4 Tr. 92 (testimony of Thomas Hazen).

Plaintiff also offered evidence that defendants fired plaintiff in order to prevent plaintiff from acquiring any pension entitlements. While the discharge of an employee in order to eliminate the employee's pension rights cannot, by itself, establish age discrimination, courts have held that such conduct provides some proof of an ADEA violation. *Visser* v. *Packer Engineering Associates, Inc.*, 924 F.2d 655, 658 (7th Cir. 1990); *Benjamin* v. *United Merchants and Manufacturers, Inc.*, 873 F.2d 41, 43 (2d Cir. 1989). It is undisputed that a Hazen Paper employee acquires vested rights to pension benefits after having worked for Hazen for ten years. Plaintiff testified that at the time of his discharge, he "was just a few hours away from being fully vested" in the pension plans offered by Hazen Paper Company. 1 Tr. 128. Thomas Hazen was in charge of pension account matters

[1] The trail transcript comes in six volumes. The Court will cite the trial transcript by volume number and page. For example, the Court would cite to page 25 of volume 2 as follows: 2 Tr. 25.

at Hazen Paper Company, and regularly received pension account documents regarding individual employee pension status. 4 Tr. 94-95. Thomas Hazen testified that at the time of plaintiff's termination, plaintiff had nine years and several months of service at Hazen Paper Company. 4 Tr. 97-98. While Thomas Hazen denied discharging plaintiff to prevent his pension rights from vesting, the jury could reasonably have found that defendants knew of plaintiff's status as to the pension fund, and chose to discharge him with the intent to interfere with his pension rights.

Plaintiff testified that the Hazens also made comments with regard to plaintiff's age. On the first day of trial, plaintiff testified that Thomas Hazen had stated that "it was costing him a lot more for my [insurance] policy because I was so old." 1Tr.151. According to plaintiff, Robert Hazen had also mentioned that the Hazen s handball court membership would not be useful for plaintiff because of plaintiff's age. 1 Tr. 151.

The jury also heard evidence regarding defendants' offer of a consulting arrangement to plaintiff. Thomas Hazen testified that in May of 1986, before plaintiff was fired, he offered plaintiff a consulting contract. Thomas Hazen testified that persons employed by Hazen Paper as consultants did not accrue employee benefits: no vacation benefits, pension rights, or health or disability insurance. 4 Tr. 106-107. From this testimony, the jury could reasonably have concluded that defendants sought to receive plaintiff's services, but did not wish to extend to plaintiff certain benefits that were offered to younger employees.

While the Court finds this evidence of age discrimination a bit thin, the evidence is sufficient to support the jury's verdict. A judge may not grant judgment notwithstanding the verdict simply because he would have reached a different conclusion had he been the trier of fact. *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978). Rather, judgment notwithstanding the verdict is appropriate only where the evidence can reasonably lead to only one conclusion. Because the Court finds that the jury could have reasonably found age discrimination,

based on the evidence adduced at trial and reasonable inferences drawn therefrom, the verdict as to age discrimination will stand.

b. Liquidated Damages: The Question of Willfulness

On the issue of willfulness, however, the Court finds the evidence deficient. In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), the Supreme Court, adopting a Second Circuit definition, held that a violation of ADEA is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 126, *citing Air Line Pilots Ass'n, International* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983), *aff'd in part and rev'd in part, Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985).[3] In adopting the "knew or showed reckless disregard" standard, the Supreme Court explicitly rejected the notion that a willful violation exists where "the employer simply knew of the potential applicability of the ADEA," *Thurston*, 469 U.S. at 127, or where the employer merely knew that the ADEA was "in the picture." *Id.*, *citing Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert.*

[3] Prior to *Thurston*, the First Circuit in *Loeb* held that a violation of the ADEA is willful if "done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." 600 F.2d at 1020, n. 27, *quoting* E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977). In *Thurston*, however, the Supreme Court adopted the "knew or showed reckless disregard" standard for willfulness in ADEA cases. The Supreme Court further stated that "[w]e do not agree with TWA's argument that unless it intended to violate the Act, double damages are inappropriate under § 7(b) of the ADEA. Only one Court of Appeals has expressed approval of this position. *See Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020, n. 27 (1st Cir. 1979)." *Thurston*, 469 U.S. at 126 n. 19.

While the First Circuit has not expressly overturned *Loeb* with respect to the standard for determining willfulness,, the First Circuit has applied *Thurston*, without reference to *Loeb*, when deciding the question of willfulness under the ADEA. *Aledo-Garcia* v. *Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354, 357 (1st Cir. 1989). Thus, the Court finds that the language of *Thurston* operates to overrule *Loeb* with respect to the standard of willfulness that applies in ADEA cases.

denied, 409 U.S. 948 (1972). The Supreme Court rejected these proposed standards because they "would result in an award of double damages in almost every case." *Thurston*, 469 U.S. at 128. "Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) [29 U.S.C. § 626(b)] in a manner that frustrates this intent." *Id.*

It is with some difficulty that the Court applies the "knew or showed reckless disregard" standard to the facts of the instant case. In *Thurston*, Trans World Airlines ("TWA") adopted a policy which allowed airplane captains who were disqualified from serving as captains for reasons not related to age (e.g., medical incapacity) to transfer to positions as flight engineers. However, those captains over the age of sixty could not automatically transfer. Any captain aged sixty years or more could transfer to flight engineer status only if he successfully bid for flight engineer status pursuant to a collective bargaining agreement. The Supreme Court held that the policy discriminated against protected pilots in violation of the ADEA. However, the Court held that the violation was not willful because TWA made good faith efforts to fashion a policy in compliance with the ADEA.

In cases like *Thurston*, which involve employment policies or employment plans, the "knew or showed reckless disregard" standard functions adequately because it penalizes employers who institute discriminatory policies that they know violate that ADEA, or that indicate the employer's reckless disregard for the provisions of the ADEA. Indeed, the "knew or showed reckless disregard standard" guarantees that liquidated damages serve their proper punitive function, different from the pure compensatory role of actual damages. *Thurston*, 469 U.S. at 125.

Unlike *Thurston*, the case at hand involves a claim of discrete employment discrimination. Plaintiff alleged discriminatory treatment against him as an individual based on his age,

without reference to any employment policy. To prevail on his ADEA claim, plaintiff had to prove, and did prove, that " 'but-for' defendants' motive to discriminate against him because of age, he would not have been discharged." *Loeb*, 600 F.2d at 1019. Having so proven, a wooden application of the "knew or showed reckless disregard" standard would not properly distinguish between simple and willful ADEA violations, because plaintiff, in establishing the actual ADEA violation, already had to prove that age discrimination motivated the employer to fire plaintiff. *Menard*, 848 F.2d at 285. The "knew or showed reckless disregard" standard, applied without reference to the two-tiered liability scheme, would therefore result in liquidated damages in practically every case of discrete employment discrimination, despite the Supreme Court's rejection of such a result.

Courts from other circuits have found it necessary to distinguish between simple and willful age discrimination, in an effort to insure that liquidated damages awards do not become automatic. *Turner* v. *Schering-Ploug Corp.*, 901 F.2d 335, 346 (3rd Cir. 1990); *Neufeld* v. *Searle Laboratories*, 884 F.2d 335, 340-41 (8th Cir. 1989); *Hansard* v. *Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989); *Anderson* v. *Phillips Petroleum Co.*, 861 F.2d 631, 635-36 (10th Cir. 1988). In *Neufeld*, *supra*, for example, the court decided that there must be "direct evidence — more than just an inference from, say, an arguably pretextual justification—of age-based animus" to warrant an award of liquidated damages. *Neufeld*, 884 F.2d at 340.

To date, the First Circuit has offered no guidance on this point. Thus, while the Court will apply the "knew or showed reckless disregard" standard in accordance with controlling precedent, it will not apply that standard in a manner that would frustrate congressional intent or Supreme Court interpretations. Upon consideration of *Neufeld* and similar authorities, the Court now holds that plaintiff, in order to

recover liquidated damages, must prove that the employer engaged in specific age-based conduct that rises above an ordinary ADEA violation. Inferential evidence of discrimination is not enough to establish willfulness. Mere proof of an ADEA violation, without more, does not adequately distinguish between ordinary and willful violations of the ADEA. There must be proof sufficient to push the level of conduct to a higher plateau. Having so stated the law, the Court now decides that the jury's finding of willfulness must be set aside for the following reasons.

The evidence in this case, if examined in relation to ADEA cases considered by courts of appeals in other circuits, is simply not adequate to warrant a finding of willfulness. In *Reynolds* v. *CLP Corporation*, 812 F.2d 671 (11th Cir. 1987), the plaintiff was demoted and then fired from her position as store manager after fifteen years of service. The plaintiff alleged "that CLP engaged in a systematic campaign of harassment and humiliation in an effort to force [plaintiff] to resign." *Id.* at 673. The evidence showed that the employer expressly sought "new" and "young Miss America type" employees. *Id.* The case also included evidence that less than six months before her discharge, the employer demoted plaintiff, cut her pay by $10,000.00, placed her under the supervision of a store manager who "had ways of getting rid of CLP's unwanted employees," *id.*, fired her, and replaced her with a woman in her twenties. The court of appeals upheld the jury's award of liquidated damages.

In *Neufeld*, *supra*, the employer fired plaintiff, age 52, after seventeen years of service in the Kansas City sales district. The employer replaced plaintiff with a twenty-seven year old sales agent. *Neufeld*, 884 F.2d at 337. Testimony of a non-party employee indicated that plaintiff's supervisor from Kansas City, Ed Kill, tried to emulate other sales districts. "Kill said that the Indianapolis district manager had 'gotten rid of the older people . . . [and] had hired younger people,' and that 'this is what [Kill] was trying to do with [the Kansas City] district.'" *Id.* at 338, *citing* district court transcript at 336. The testimony showed that Mr. Kill found Mr. Neufeld to be the appropriate

"sacrificial lamb." *Id.* at 338. Mr. Neufeld was the oldest sales agent in the district, and the evidence clearly supported the jury's finding that Mr. Kill fired Mr. Neufeld because of his age. According to one witness, "Kill commented that 'one way of looking at it, you get rid of the old guys, put in the new people, the figures change.'" *Id.* at 338, *citing* district court transcript at 764. Again, the court of appeals upheld a jury's finding of willfulness.

The *Reynolds* and *Neufeld* cases contain strong evidence of age-based discrimination by the employer. In these cases, the employer demoted the older employee, or cut the employee's pay, or made disparaging statements directed at the employee's age, or otherwise by conduct or statements established a plain nexus between the discharge and the employee's age. In comparison, the instant case, while containing the few strands of age-based evidence summarized above, lacks powerful evidence of age-based animus.

The instant case closely resembles cases such as *Smith* v. *Consolidated Mutual Water Co.*, 787 F.2d 1441 (10th Cir. 1986), where the Tenth Circuit Court of Appeals found no willful ADEA violation. In *Smith*, the plaintiff's supervisor often referred to plaintiff as "an old goat," criticized him for being slow, commented that he had been "knocked around a bit over the years," and fired him in favor of a younger worker. *Smith*, 787 F.2d at 1442. The Court held that "[a]lthough the evidence is thin and circumstantial, we conclude that, taken as a whole, it is enough to permit a reasonable juror to infer that age was a determinative factor in Consolidated's decision." *Id.* While the court of appeals found that plaintiff had adequately proven an ADEA violation, the court held that "[t]he thin nature of the evidence presented by Mr. Smith at trial compels us to agree with the trial court that Consolidated's conduct was not 'willful' under the standard announced by the Supreme Court in *Trans World Airlines, Inc.* v. *Thurston*, *supra*." *Id.* at 1443.

The Court has also considered *Morgan* v. *Arkansas Gazette*, 897 F.2d 945 (8th Cir. 1990). In *Morgan*, numerous Gazette

employees testified regarding the age-based employment decisions allegedly made by a particular Gazette manager, one Tinker. The record indicated "a pattern of employees over the age of forty leaving the circulation department and being replaced by younger employees. . . ." *Morgan*, 897 F.2d at 950. Testimony demonstrated age-based hiring, payment and firing practices by Mr. Tinker. The record contained evidence that Mr. Tinker referred to an older employee as an "old fuddy-duddy," and that "no matter what he did, [Morgan] would be fired because Tinker was out to get all the older, experienced employees." *Id.* As in *Smith*, the court of appeals found the evidence sufficient to support a finding of liability, but inadequate under *Thurston* to trigger liquidated damages. *See also Krause* v. *Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir. 1990)(even though jury finds that employer discharged plaintiff in violation of ERISA, court of appeals finds evidence insufficient to support a finding of willfulness); *Gillian* v. *Armtex, Inc.*, 820 F.2d 1387 (4th Cir. 1987)(in affirming judgment notwithstanding the verdict on the question of liquidated damages, the court of appeals finds the evidence "too thin" to support of [sic] finding of willfulness).

In the instant case, as in *Smith* and *Morgan*, the evidence was largely circumstantial. Indeed, Mr. Biggins' testimony supplied almost all of the evidence of age discrimination offered in the case. While "[a] claim of discrimination need not be proven solely through direct evidence," *Conway* v. *Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987), the Court will not allow liquidated damages if based on sparse or circumstantial evidence, or on self-serving testimony. Having considered the evidence as a whole and as summarized above, the Court finds the evidence incapable of supporting a finding of willfulness.

c. Count II: ERISA

In Count II of the complaint, plaintiff alleges that defendants fired him in order to prevent his attainment of pension rights, in violation of section 510 of ERISA, 29 U.S.C. §1140. The jury

found in plaintiff's favor on Count II, and awarded plaintiff $100,000.00 in damages.

Section 510 provides that "[i]t shall be unlawful for any person to discharge . . . a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee pension plan) . . . ." Congress designed section 510 to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." *West* v. *Butler*, 621 F.2d 240, 245 (6th Cir. 1980). To recover under section 510, a plaintiff must prove that "an employer was at least in part motivated by the specific intent to engage in activity prohibited by § 510." *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988)(citations omitted). However, proof that an employee lost pension benefits as a mere consequence of discharge will not create a cause of action under ERISA. *Gavalik* v. *Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987); *Titsch* v. *Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd mem.*, 742 F.2d 1441 (2d Cir. 1983). Plaintiff must demonstrate that the employer fired him with the "unlawful purpose" to prevent plaintiff from attaining pension rights. *Dister*, 859 F.2d at 1111 (collecting cases).

Plaintiff offered ample evidence of an ERISA violation, and the jury verdict on Count II must therefore stand. Plaintiff testified that at the time of his discharge, he had almost ten years of service at Hazen Paper Company. 1 Tr. 128.[4] Thomas Hazen offered similar testimony. 4 Tr. 97-98. Thomas Hazen also testified that he was in charge of pension account matters at Hazen

[4] After the conclusion of discovery, plaintiff's counsel found that plaintiff may in fact have attained the right to collect pension benefits before defendants fired him. Plaintiff offered into evidence, as exhibit 28, the summary plan description of defendants' pension plan. 4 Tr. 97. The summary plan description provides that "if the aggregate of years and months of service exceeds five, then an additional year will be added in determining your vested percentage." 4 Tr. 97 (testimony of Thomas Hazen). If this provision applied to plaintiff, then plaintiff would have had more than ten years of service for pension purposes.

Paper Company, and regularly received pension account statements regarding individual employee pension status. 4 Tr.94-95. This evidence, in combination with evidence of the proffered consulting position, supports the inference that defendants fired plaintiff with the intent to deprive him of earned pension benefits. Because the jury could reasonably have drawn such an inference from the evidence, the Court will not set aside the verdict with regard to the ERISA claim.

d. Count IV: Wrongful Discharge

On Count IV, the jury returned a verdict in plaintiff's favor, and awarded one dollar in damages.

The general rule in Massachusetts is that an at-will employee-like plaintiff may be terminated with or without cause. *Glaz* v. *Ralston Purina Co.*, 24 Mass. App. Ct. 386, 389, 509 N.E.2d 297, 299, *rev. denied*, 400 Mass. 1106, 513 N.E.2d 1289 (1987). Exceptions to the general rule exist, however. For example, an employee has a cause of action for wrongful discharge if the discharge is in bad faith or contrary to public policy. *DeRose* v. *Putnam Management Co., Inc.*, 398 Mass. 205, 210, 496 N.E.2d 428, 431 (1986); *Siles* v. *Travenol Laboratories, Inc.*, 13 Mass. App. Ct. 354, 433 N.E.2d 103, *rev. denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982).

Defendants argue that "[p]laintiff's recovery for wrongful discharge . . . depends upon the enforceability of the stock promise and whether plaintiff ever was lawful owner of the water based acrylic formula." Defendants' Brief in Reply to Plaintiff's Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 12 (October 23, 1990) ("Defendants' JNOV Reply"). Defendants contend that "[p]laintiff's claim has always been that selling the rights to 'his process or formula' was consideration for Hazen stock." Defendants' Brief in Support of Motion for Judgment Notwithstanding the Verdict at 11 (September 11, 1990)("Defendants' Brief for JNOV"). Because the jury found that plaintiff never owned the paper treatment formula in question, defendants argue, any alleged

stock-for-formula agreement lacks consideration, and is unenforceable. Thus, defendants contend that they cannot be liable for wrongful discharge, because the firing of plaintiff did not prevent plaintiff from receiving a benefit tc which he was entitled.

The Court finds defendants' argument unpersuasive because it does not properly characterize plaintiff's wrongful discharge claim. It is true that the jury found that plaintiff had no ownership rights to the formula. *See* Special Verdict at 3 (July 20, 1990). However, while plaintiff does claim that defendants agreed to compensate him with stock in return for use of the formula, plaintiff also contends that defendants promised the stock as compensation for services rendered. No party disputes that plaintiff repeatedly sought greater compensation for his work at Hazen Paper Company; the disagreement centers around what defendants did to accommodate plaintiff's demand.

Plaintiff's version is that defendants agreed that plaintiff deserved a $100,000.00 salary for the work he performed for defendants, 1 Tr. 97, and that defendants agreed to pay plaintiff "the difference between my salary and $100,000.00 in stock." 1 Tr. 98. Plaintiff testified that when reminded by plaintiff of the stock promises, Thomas Hazen never denied that he promised plaintiff stock compensation, 1 Tr. 105, 125, but that defendants nevertheless failed to tender the stock as promised. *Id.* Plaintiff further testified that he agreed to sign over to defendants any rights he had to the paper treatment formula in return for fulfillment of the stock promises. 1 Tr. 98-99. Finally, after plaintiff refused to sign the confidentiality agreement, defendants fired plaintiff in order to avoid honoring their stock promise. 1 Tr. 126-27.

Given this evidence, the Court finds ample consideration for the stock promise alleged by plaintiff. The agreement called for increased compensation for plaintiff, in the form of salary or its equivalent. The consideration for the stock promise was the present and continued satisfactory performance of services for

Hazen Paper Company. Thus, while the jury's verdict with regard to the ownership of the formula does reject the notion that plaintiff had any ownership right to the formula, it does not entirely destroy consideration for the stock promise.

The evidence also suffices to support the verdict for wrongful discharge. As noted above, plaintiff in this case testified — and the jury found — that defendants promised plaintiff stock, as a substitute for salary, equal in value to the difference between plaintiff's salary and $100,000.00. Plaintiff also testified that while the Hazens never denied promising the stock, they never delivered on the promise, and fired plaintiff in order to avoid rendering the promised compensation. Therefore the Court will not disturb the jury's verdict on Count IV.

e. Count V: Fraud

In Count V, plaintiff alleged that defendants fraudulently failed to honor their promise to compensate plaintiff with stock. The jury found in plaintiff's favor, and awarded plaintiff $315,098.00 in damages for fraud.

> "[A] fraud may be defined to be any artifice whereby he who practices it gains, or attempts to gain, some undue advantage to himself, or to work some wrong or do some injury to another, by means of a representation which he knows to be false, or of an act which he knows to be against right or in violation of some positive duty."

Commonwealth v. *O'Brien*, 305 Mass. 393, 397-398, 26 N.E.2d 235, 238 (1940), *quoting Commonwealth* v. *Tuckerman*, 76 Mass. (10 Gray) 173, 203 (1857). An action in fraud requires plaintiff to prove "that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to his damage." *Barrett Associates, Inc.* v. *Aronson*, 346 Mass. 150, 152, 190 N.E.2d 867, 868 (1963), *quoting Kilroy* v. *Bar-*

ron, 326 Mass. 464, 465, 95 N.E.2d 190, 191 (1950). Because the evidence adduced at trial amply satisfies these elements, the jury verdict for fraud will stand.

In essence, defendants' attack on the jury's fraud verdict comes in two parts. First, defendants argue that plaintiff failed to prove detrimental reliance on defendants' misrepresentation. Second, defendants assert that plaintiff never established damages directly resulting from defendants' misrepresentation. The Court will discuss each contention in turn.

A plaintiff must prove more than mere deception to establish a cause of action for fraud. Massachusetts case law requires that a plaintiff show detrimental reliance in order to collect for fraud. *Nei* v. *Burley*, 388 Mass. 307, 311, 446 N.E.2d 674, 677 (1983); *Kilroy*, 326 Mass. at.465, 95 N.E.2d at 191. Courts will find detrimental reliance where the misrepresentation "materially influenced" the plaintiff, in whole or in part, to take action or refrain from acting. *National Shawmut Bank* v. *Johnson*, 317 Mass. 485, 490, 58 N.E.2d 849, 852; *Schinkel* v. *Maxi-Holding, Inc.*, 30 Mass App. Ct. 41, 48, 565 N.E.2d 1219, 1224 (1991)(plaintiff adequately states a claim for fraud where, although plaintiff rendered managerial services and partial payments in reliance on defendants' promise to tender company stock, defendants refused to deliver stock as promised).

Massachusetts law further provides that in a fraud action, the misrepresentation need not be the sole or predominating motive that induced the victim to engage in particular conduct. *National Shawmut Bank*, 317 Mass. at 490, 58 N.E.2d at 852. There may be one or many motivating reasons for a person's act or omission; but if a person acts or refrains from acting, in complete or partial reliance on a false representation, the element of detrimental reliance is satisfied. *See National Car Rental System, Inc.* v. *Mills Transfer Company*, 7 Mass. App. Ct. 850, 852, 384 N.E.2d 1263, 1264 (1979).

Defendants argue that because the jury found that plaintiff never owned the formula, plaintiff cannot assert that his "detriment" was loss of rights to the formula. Defendants' Brief for

JNOV at 12-13. While the Court agrees with defendants that plaintiff cannot claim as his legal detriment the loss of rights to the formula, plaintiff adequately proved other legal detriment sufficient to support a finding of fraud. As with the wrongful discharge count, *see supra* at 19-22, plaintiff's rendition of present and continuing service at Hazen Paper Company provides the legal detriment for the fraud claim. All parties agree that plaintiff sought a $100,000.00 salary in exchange for his continuing employment. Plaintiff testified, and the jury apparently believed, that defendants agreed to pay plaintiff approximately $44,000.00 in salary, and the balance of plaintiff's compensation in stock. 1Tr.98. Thus, the jury could have found that plaintiff continued to work for Hazen Paper Company, after defendants initially promised to give plaintiff stock, in reliance on the stock promise. This provision of continued services in exchange for the stock promise is sufficient to provide "detrimental reliance."

Defendants further argue that plaintiff did not rely to his detriment on defendants' misrepresentation because "plaintiff failed to introduce any evidence indicating that Plaintiff was deprived of alternative employment opportunities by remaining a Hazen employee during the period that the alleged promise was made." Defendants' Brief for JNOV at 13. This argument confuses the element of reliance with the element of damages. Although proof of lost wages or income might help bolster a claim for fraud, plaintiff need not show that his reliance caused him to forego earning opportunities of which he might otherwise have availed himself. Rather, plaintiff need only show that he acted or refrained from acting, at least in part because he relied on the misrepresentation. As discussed *supra*, plaintiff satisfied the reliance element by showing that he continued to work at Hazen Paper Company, after the misrepresentation, in part because the Hazens promised to compensate him with shares of Hazen Paper Company stock in addition to his salary.

With respect to damages, however, a plaintiff who alleges

may recover according to the "benefit of the bargain" rule. *Productora e Importadora de Papel, S.A. de C.V.* v. *Fleming*, 376 Mass. 826, 838, 383 N.E.2d 1129, 1136-37 (1978); *Rice* v. *Price*, 340 Mass: 502, 507-511, 164 N.E.2d 8911 894-97 (1960). This means that plaintiff may recover as damages the value of the benefit that he would have received had the misrepresentations been true. Under the benefit of the bargain rule, "damages would be measured by the difference in value between the performance promised . . . and that actually rendered." *Fleming*, 376 Mass. at 838, 383 N.E.2d at 1137.

In this case, plaintiff offered evidence of the value of the stock promised him. Plaintiff's witnesses testified to the value of Hazen stock in the relevant years, 2 Tr. 154-55 (John T. Moriarty, certified public accountant), and to the value of the total stock that plaintiff would have received had defendants honored their stock promise. 2 Tr. 193-94 (Dr. Craig L. Moore, professor of management at the University of Massachusetts); *see* Plaintiff's Trial Exhibit 21 (containing Dr. Moore's calculations regarding stock loss, estimated at $342,498.00). This unrefuted testimony provides sufficient evidence of damages, consistent with the "benefit of the bargain" rule, in an amount equal to the value of the compensation that plaintiff would have received had defendants made good on the stock promise.

In short, because plaintiff offered evidence sufficient to satisfy the elements of fraud, the jury's verdict on Count V will stand.

f. Count VII: Massachusetts Civil Rights Act

On Count VII, the jury found that defendants violated plaintiff's rights under the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H, 11I ("MCRA"). The jury awarded damages in the amount of $1.00.

The Massachusetts legislature created the MCRA to protect individuals from civil rights violations perpetrated by private parties. *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 98, 502 N.E.2d 1375, 1378 (1987) (MCRA contains no

state action requirement). Courts should construe the provisions of the MCRA broadly in order to effectuate the remedial purposes of the statutes. *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 822, 473 N.E.2d 1128, 1130 (1985) ("*Batchelder II*").

To establish a violation of the MCRA, a plaintiff must prove that

> (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by "threats, intimidation or coercion."

Bally v. *Northeastern University*, 403 Mass. 713, 717, 532 N.E.2d 49, 51-52 (1989). Of course, "[n]ot every violation of law is a violation of the State Civil Rights Act." *Longyal* v. *Commissioner of Correction*, 404 Mass. 325, 3331 535 N.E.2d.588, 593 (1989). "[T]he legislature did not intend to create 'a vast constitutional tort,' and thus explicitly limited the [MCRA]'s remedy to situations where the derogation of secured rights occurs by threats, intimidation or coercion." *Bally*, 403 Mass. at 718, 532 N.E.2d at 52, *quoting Bell* v. *Mazza*, 394 Mass. 176, 182-183, 474 N.E.2d 111 (1985)

Defendants argue that the Court should grant judgment notwithstanding the verdict because, contrary to plaintiff's contention, defendants did not deprive plaintiff of any property rights. Defendants further argue that even if defendants did deprive plaintiff of some property right, no threat, intimidation, or coercion was involved.

Plaintiff, on the other hand, has consistently asserted that defendants used threats, intimidation and coercion in an effort to take plaintiff's property rights to the formula without just compensation. *See, e.g.*, Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 25 (April 13,

1990); Plaintiff's Amended Complaint at 12 (July 26, 1988). Given the jury's verdict as to ownership of the formula, however, this argument must fail. Any claim by plaintiff based on ownership rights to the formula must fail in light of the jury's determination that defendants owned the formula throughout the relevant time period.

Apparently in response to the jury's verdict, plaintiff makes a slightly different argument with regard to his MCRA claim in his post-trial pleadings. Plaintiff now argues that defendants interfered with plaintiff's rights to Hazen Paper Company stock. "[Plaintiff's] property right to the stock was the subject of coercion when the Defendants attempted to extort from him a release of the formula rights without payment of their stock promise." Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict at 16 (September 25, 1990). Plaintiff claims that defendants violated the MCRA because they did not tender stock as promised, and that they threatened to and did fire plaintiff in order to avoid the stock obligation. Accepting these allegations as true, the Court must nevertheless grant judgment notwithstanding the verdict on Count VII.

The Supreme Judicial Court has never expanded the MCRA to encompass conduct such as that alleged by plaintiff. Most MCRA actions recognized by the Supreme Judicial Court involve the threat of physical contact. *O'Connell* v. *Chasdi*, 400 Mass. 686, 511 N.E.2d 349 (1987)(sexual harassment in employment); *Batchelder II*, *supra* (plaintiff threatened by shopping mall security officer while plaintiff distributes pamphlets); *Bell*, *supra* (defendants threaten to do "anything at any cost" to prevent improvement of property next door). The Supreme Judicial Court has refused to expand the MCRA to reach drug testing of student athletes by university officials, *Bally*, *supra*, or the improper taking of real property by a town board of selectmen. *Pheasant Ridge Associates* v. *Town of Burlington*, 399 Mass. 771, 506 N.E.2d 1152 (1987). Those few MCRA cases that do not involve threats of physical harm have

involved more than simple violations of law. For example, *Redgrave*, *supra*, concerned conduct that was both in violation of uncontested and existing contract rights, and destructive to the exercise of first amendment or other important individual rights. *See also Longval*, 404 Mass. at 333, 535 N.E.2d at 593 ("A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion. . . ."); *Karetnikova* v. *Trustees of Emerson College*, 725 F. Supp. 73 (D. Mass. 1989).

Given this authority, plaintiff's MCRA claim fails. The evidence simply does not demonstrate "threats, intimidation or coercion" as those words have been defined by the Supreme Judicial Court, and this Court cannot change the scope of state law in order to accommodate plaintiff's claim.

g. Count VIII: Breach of Contract

The jury found defendants liable for breach of employment contract, and awarded plaintiff damages in the sum of $266,897.00.

Defendants contend that no employment contract existed between plaintiff and defendants, and that they are entitled to judgment notwithstanding the verdict on that basis. *See* Defendants' JNOV Reply at 17-19. Defendants further argue that even if defendants did breach an employment contract, plaintiff failed to prove damages resulting from the breach.[5] The Court, however, finds that an employment contract did exist, and that defendants' conduct, viewed in a light most favorable to plaintiff, constituted breach of that contract. The Court fur-

[5] In their motion to alter or amend the judgment, defendants argue that the jury adequately compensated plaintiff under the ADEA claim, and that any award of damages for breach of contract is duplicative. Defendants' Memorandum in Support of Motion to Alter or Amend Judgment at 2 (September 11, 1990) ("Defendants' Memorandum to Alter or Amend"). This argument, although made in the motion to alter or amend, is relevant to the issue of judgment notwithstanding the verdict on the breach of contract claim, because it concerns the element of damages. Thus, the Court will consider defendants' duplicative damages argument in the context of judgment notwithstanding the verdict, and will discuss the remainder of defendants' motion to alter or amend *infra*.

ther finds evidence of damages due to the breach. Therefore, the Court denies defendants' motion for judgment notwithstanding the verdict on the breach of contract claim.

A binding employment contract exists where there is certainty as to the parties bound, the nature of the service, and the approximate compensation due. *Parsons* v. *Trask*, 73 Mass. (7 Gray) 473, 477-78 (1856). A valid employment contract may be "'found to exist from the conduct and relations of the parties.'" *Jackson* v. *Action for Boston Community Development*, 403 Mass. 8, 9, 525 N.E.2d 411, 413 (1988), *quoting LiDonni, Inc.* v. *Hart*, 355 Mass. 580, 583, 246 N.E.2d 446, 449 (1969). Where an employee provides services in return for wages paid by the employer, courts will, in the absence of express provisions to the contrary, infer the existence of an at-will employment contract. *Jackson*, 403 Mass. at 13, 525 N.E.2d at 414; *DeRose*, 398 Mass. at 206, 496 N.E.2d at 429.

If nothing more, plaintiff in this case had an at-will employment contract with defendants. Plaintiff received wages in return for services rendered. In addition, the jury could, and apparently did, find that the circumstances surrounding plaintiff's employment and the language in the Hazen Paper Company manual supplied additional implied provisions to plaintiff's employment contract. Massachusetts law permits such a finding. *Jackson*, 403 Mass. at 14, 525 N.E.2d at 415 (collecting cases). Viewing the evidence in a light most favorable to the plaintiff, the jury could have found that the employment contract prohibited defendants from firing plaintiff unless plaintiff committed "outlandish, gross violations of standards or fail[ed] to respond to repeated counselling. . . ." Plaintiff's Trial Exhibit 11 at 3 (Hazen Paper Company Employee Handbook on Personnel Policies and Benefits).

Having established the existence of the contract and its terms, plaintiff also demonstrated that defendants breached the contract. Again viewing the evidence in a light most favorable to

plaintiff, the jury could have found that defendants breached the contract in all or any of three ways: by discharging plaintiff because of his age, by discharging plaintiff in order to prevent him from enjoying his pension rights, or by discharging plaintiff in order to avoid honoring their stock promise. The Court has adequately reviewed the evidence of these illegalities *supra*.

However, once plaintiff establishes the existence of a contract and a breach of that contract, he must also prove that he suffered damages caused by defendants' breach of the contract. *Goldman* v. *Mahoney*, 354 Mass. 705, 709, 242 N.E.2d 405, 409 (1968); *Gray* v. *Tobin*, 252 Mass. 238, 147 N.E. 580 (1925). Plaintiff may not collect duplicate damages under a state law theory if the jury has already compensated him under a federal statute. *See Howard* v. *Daiichiya-Love's Bakery, Inc.*, 714 F. Supp. 1108, 1113 (D. Hawaii 1989)(ADEA case); *see also Freeman* v. *Package Machinery Co.*, 865 F.2d 1331, 1344 n.7 (1st Cir. 1988). Thus, plaintiff's evidence must show that the damages awarded on the breach of contract claim are independent and separate from the damages awarded under the ADEA, ERISA, fraud or other counts.

Defendants here argue that plaintiff's recovery for breach of contract duplicates damages already recovered under the ADEA. The Court rejects this argument. As evidence of damages, plaintiff offered the testimony and calculations of Dr. Moore. While all of the damages stated by Dr. Moore's [sic] were compensable under the ADEA, the jury needed not award the money exclusively under that theory. Rather, the jury could have awarded part of the damages under the ADEA, and part under other theories. The jury awarded $560,775.00 under the ADEA, $100,000.00 under ERISA, and $266,897.00 under the breach of contract claim. Such an award, while fragmentary, is permissible under existing law, as long as the total sum awarded by the jury does not exceed the credible evidence of damages offered at trial.

The Court further notes that under existing law, recovery under the ADEA does not preempt tort or contract claims under

state law. *Linn* v. *Andover Newton Theological School, Inc.*, 874 F.2d 1 (1st Cir. 1989)(plaintiff may recover under ADEA and for breach of employment contract); *Cancellier* v. *Federated Department Stores*, 672 F.2d 1312, 1318 (9th Cir.) (court finds that recovery under the ADEA does not preempt award of damages based on defendant's state claim of breach of employment contract), *cert. denied*, 459 U.S. 859 (1982); *accord Pettibon* v. *Pennzoil Products Co.*, 649 F. Supp. 759, 761 (W.D. Pa. 1986).[6] The Court therefore denies defendants' motion for judgment notwithstanding the verdict on the breach of contract claim.

2. New Trial

Having found judgment notwithstanding the verdict inappropriate in all respects except as to willfulness and Count VII, the Court must now consider defendants' new trial arguments.

---

[6] The Ninth Circuit Court of Appeals, among other courts, has expressed concern with the "wisdom of allowing open-ended state claims for breach of the implied covenant to coexist with ADEA claims. . . ." *Cancellier*, 672 F.2d at 1318. This Court also dislikes the notion that plaintiff can recover under a state contract theory damages that are available under the ADEA. *See Loeb*, 600 F.2d at 1021. Under the ADEA, a plaintiff may recover " 'items of pecuniary or economic loss such as wages, fringe, and other job-related benefits.' " *Id.*, *quoting* H. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 523, 535. Arguably, plaintiff received under the ADEA all the damages to which he was entitled. Indeed, the Court finds no evidence of record showing that plaintiff suffered damages from the breach of contract separate and independent from those already recovered pursuant to the ADEA, ERISA, or fraud. To the contrary, it seems likely that the awards returned under the various state law counts (totalling $581,997.00) represent small parts of the larger ADEA award. However, the Court will not speculate as to the jury's calculations. Absent any instructive First Circuit authority with regard to whether plaintiffs can recover, on a state contract theory, damages available under the ADEA, the Court is reluctant to disturb the jury's verdict. Thus, because plaintiff has established the elements of breach of contract, the jury may under existing law award him additional damages under that theory.

> The Court may set aside a verdict and grant a new trial "when the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice." *Phav* v. *Trueblood, Inc.*, 915 F.2d 764, 766 (1st Cir. 1990) (citations omitted). While a trial court should not grant a new trial simply because the court would have reached a different conclusion, the court wields broad discretion in determining whether to grant a new trial. *de Perez* v. *Hospital del Maestro*, 910 F.2d 1004, 1006 (1st Cir. 1990). This Court exercises its discretion frugally, and will not grant a new trial unless necessary to prevent a significant dereliction of justice.

Flag Fables, Inc. v. *Jean Ann's Country Flags and Crafts, Inc.*, 753 F. Supp. 1007, 1012 (D. Mass. 1990)(Freedman, C.J.).

Defendants make numerous arguments in support of their motion for new trial. *See generally* Defendants' Brief in Support of Motion for New Trial (September 11, 1990)("Defendants' Brief for New Trial") and Defendants' Brief in Reply to Plaintiff's Opposition to Defendants' Motion for New Trial (October 23, 1990)("Defendants' New Trial Reply"). Some of these arguments were rejected *supra* with respect to defendants' motion for judgment notwithstanding the verdict, and the Court finds them equally impotent in the new trial context. The Court will, however, briefly discuss two of defendants' most vehement arguments.

Defendants first argue that the jury awarded an excessive amount of damages. While a court may grant a new trial if the jury has awarded excessive damages, a jury may if it chooses award generous damages. In cases involving age discrimination, the district court may set aside damages awards and grant a new trial only if the verdict is "shown to exceed 'any rational appraisal or estimate of the damages that could be based upon

the evidence before the jury.'" *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 871 (1st Cir. 1982), *quoting Glazer* v. *Glazer*, 374 F.2d 390, 413 (5th Cir.), *cert. denied*, 389 U.S. 831 (1967). The cases clearly indicate that where credible evidence of damages exist, the court may not disturb the jury award. *Cf. Hendricks & Associates, Inc.* v. *Daewoo Corp.*, 923 F.2d 209 (1st Cir. 1991)(court orders remittitur or new trial where jury awarded damages in excess of those sought by plaintiff). "While in calculating damages the jury is free to select the highest figures for which there is adequate evidentiary support, it may go no higher." *Kolb*, 694 F.2d at 872.

It is uncontested that plaintiff alleged total damages in the amount of $1,375,614.12. 2 Tr. 188 (testimony of Dr. Moore); Plaintiff's Trial Exhibit 21; Plaintiff's Memorandum in Opposition to Defendants' Motion for New Trial at 8 (September 25, 1990). Plaintiff offered the testimony of Dr. Moore and Mr. Moriarty in support of that allegation, and their testimony was unrefuted. It is also true that the jury awarded a total of $1,242,772.00 in damages on all seven counts, some $132,842 less than the damages claimed by plaintiff. Because the jury did not select for total damages a figure higher than that alleged by plaintiff and evidenced in the record, the Court will not set aside any portion of the verdict on this basis.

Second, defendants argue that the jury verdict is internally inconsistent, and must therefore be set aside. Defendants argue that "[i]n order to find age discrimination, the jury had to conclude that Plaintiff's age was the 'determinative factor' in his termination. . . . Because Plaintiff allegedly would not have been terminated "but for" his age, an intent to deprive him of his pension benefits could not, as a matter of law, have been found to be the "motivating" or determinative factor in his termination." Defendants' Brief for New Trial at 3-4. Defendants thus appear to argue that the jury could not have found two determinative factors behind plaintiff's termination. Defendants demand that a new jury should decide whether plaintiff's age,

or the intent to deprive plaintiff of pension benefits, or neither, was the "determinative factor" behind plaintiff's termination.

As noted above, to recover under section 510 of ERISA, a plaintiff must prove that "an employer was at least in part motivated by the specific intent to engage in activity prohibited by § 510." *Dister*, 859 F.2d at 1111; *Baker* v. *Kaiser Aluminum and Chemical Corp.*, 608 F.Supp. 1315, 1318 (N.D. Cal. 1984). A discharged employee need not show that the sole objective behind the firing was to interfere with the employee's attainment of pension rights. *Clark* v. *Resistoflex Co. Division of Unidynamics*, 854 F.2d 762, 770 (5th Cir. 1988), *citing Gavalik*, 812 F.2d at 851. An employee need only show that the employer's desire to interfere with the employee's pension rights "was a 'determinative factor' in [the employer's] decision to terminate him." *Turner*, 901 F.2d at 347, *citing Gavalik*, 312 F.2d it 860.

The First Circuit has never explicitly held that a discharge can be motivated by two different determinative factors sufficient to satisfy both an ERISA and an ADEA claim in the same case. However, in *Loeb*, the First Circuit recognized that employers may have many motivations, both legal and illegal, for firing an employee. *Loeb*, 600 F.2d at 1019. The court of appeals held that while the employee need not prove that age was the sole factor behind the discharge, plaintiff's proof "that [age] was a determinative factor is . . . essential to recovery under the ADEA." *Id.* An employee "had to prove by a preponderance of the evidence that his age was the 'determining factor' in his discharge in the sense that, 'but for' his employer's motive to discriminate against him because of his age, he would not have been discharged." *Id.* Other courts have held that plaintiff must prove that the decision to fire was "at least in part motivated by the specific intent to engage in activity prohibited by [ADEA]." *Dister*, 859 F.2d at 1111.

Given this authority, the Court now holds that there may be more than one illegal determinative factor behind an employer's decision to discharge. Plaintiff's theory in this case offers a

good example, where the jury found that the Hazens discharged plaintiff because of his age and in order to interfere with pension rights. Were the rule otherwise, an employer who, for example, violates the ADEA would be immune from liability under ERISA, even if the evidence indicated discharge with the specific intent to interfere with pension rights. The Court cannot believe Congress intended such a construction of the statutes. Further, the Court can find no case in which a court has dismissed a lawsuit, or any portion of a lawsuit, under the ADEA and ERISA on the basis that there can be only one determining factor for the discharge. In sum, the Court finds no internal inconsistency in the verdict, and the motion for new trial is denied.

B. *Defendants' Motion to Alter or Amend the Judgment*

Defendants have moved to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Defendants make three separate arguments in support of their motion. First, defendants argue that the jury awarded duplicative damages, and that the Court should alter the judgment to prevent multiple recovery. The Court, having already found this apple unappealing, *supra* at 30-34, will not taste it again.

Second, defendants contend that plaintiff may not receive prejudgment interest on any part of his award if he has recovered liquidated damages. This is unquestionably true. *Linn* v. *Andover Newton Theological School, Inc.*, 874 F.2d 1 (1st Cir. 1989). However, the point is moot, given the Court's decision to grant defendants' motion for judgment notwithstanding the verdict on the liquidated damages question. Thus, plaintiff may collect interest on his entire award because plaintiff is not entitled to liquidated damages.

Defendants' third argument is that plaintiff may not recover interest on the fraud count because "the jury's award is clearly based upon the higher, present value of the stock." Defendants' Memorandum to Alter or Amend at 3. This argument lacks

merit. The Court must assume that the jury awarded that sum of money it felt necessary to compensate plaintiff for his loss due to defendants' misrepresentation. Indeed, no one except the jury really knows how the jury calculated the fraud award. The fact that plaintiff recovered the value of stock does not make this claim any different from other state tort claims. In fraud cases, plaintiffs often recoup money representing the value of a thing promised but not delivered. Plaintiff shall recover interest at the ordinary rate on the fraud award.

In sum, the Court denies entirely defendants' motion to alter or amend the judgment.

C. *Plaintiff's Motion for Attorney's Fees and Costs*

1. Attorney's Fees

Plaintiff has moved for an award of attorney's fees in the sum of $666,729.12. Defendants oppose plaintiff's request, and urge the Court to allow a much more modest award.

A successful plaintiff is entitled to collect reasonable attorney's fees under the ADEA. Section 626(b) of the ADEA requires that the provisions of the ADEA shall be enforced in accordance with the remedies and procedures provided in section 16 of the Fair Labor Standards Act, 29 U.S.C. § 216 ("section 216"). As amended, section 216 states that "[t]he court . . . shall, in addition to any judgment award to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and the costs of the action." The statutory language makes the award mandatory; the Court has discretion only to determine the amount of the fee award.

In civil rights cases, courts use the lodestar method to determine appropriate attorney's fees awards. *Blum* v. *Stenson*, 465 U.S. 886 (1984)(42 U.S.C. § 1983); *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983); *Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985)(ADEA). The lodestar is calculated by multiplying all of the hours reasonably expended on the litigation by a

reasonable hourly rate. *Blum*, 465 U.S. at 888. Courts should calculate reasonable attorney's fees according to prevailing market rates. *Id.* at 895. Once the court has determined the lodestar, the court may adjust the lodestar, up or down, if necessary to assure fair and adequate compensation for counsel. Courts should allow upward adjustment only "in some cases of exceptional success," *Hensley*, 461 U.S. at 435, and where plaintiff's counsel proves "that such an adjustment is necessary to determination of a reasonable fee. . . ." *Blum*, 465 U.S. at 898.

Section 1132(g) of ERISA also allows courts to award attorney's fees, but under different circumstances. While the ADEA provides for a mandatory fees award, section 1132(g) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The award of attorney's fees under ERISA falls within the broad discretion of the district court. *Gray* v. *New England Telephone & Telegraph Co.*, 792 F.2d 251, 259 (1st Cir. 1986). The court must apply a five-pronged test when considering whether to award attorney's fees.

> This five factor standard considers (1) the degree of bad faith or culpability of the losing party; (2) the ability of such party to personally satisfy an award of fees; (3) whether such award would deter other persons acting under similar circumstances; (4) the amount of benefit to the action as conferred on the members of the pension plan; and (5) the relative merits of the parties' positions.

Id. at 257-58. If, upon consideration of these factors, the district court decides to award fees, the court may rely on the lodestar method to determine the amount of the award. *Hensley*, 461 U.S. at 433 n. 7 (lodestar analysis is generally applicable in all federal fee-shifting situations); *D'Emanuele* v. *Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1382-83 (9th Cir. 1990).

The Court finds that the circumstances of this case make an

award of attorney's fees under ERISA appropriate. In particular, the evidence that plaintiff had more than nine years service at Hazen Paper Company, and that defendants fired plaintiff in order to interfere with his attainment of pension rights tips in favor of an award of attorney's fees. The general deterrent value of an attorney's fee award on industry and pension plans in the area also makes an award suitable.

Plaintiff also prevailed on various state law claims, none of which provide for attorney's fees.[7] Ordinarily, a prevailing litigant in the United States may not recover attorney's fees or costs of his action absent an express legislative directive to the contrary. *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 421 U.S. 240, 247 (1975). However, the *Alyeska* rule does not prevent fee-shifting when a plaintiff successfully prosecutes a claim under a federal civil rights statute, and in the same action seeks additional or similar relief under other federal theories or pendant state law theories. Under these circumstances, a plaintiff may recover attorney's fees incurred for both his civil rights claim and the companion claims, regardless of whether the statutes upon which the companion claims are based provide for attorney's fees awards. *Hensley*, 461 U.S. at 435; *Wagenmann* v. *Adams*, 829 F.2d 196, 225 (1st Cir. 1987). Of course, the additional claims must bear a close relationship to the federal civil rights claim. If all the claims share "a common core of facts," or are based on "related legal theories," *Hensley*, 461 U.S. at 435, an attorney's fees award should compensate plaintiff based on the time spent on the litigation as a whole. *Accord Aubin* v. *Fudala*, 782 F.2d 287, 290-92 (1st Cir. 1986)(42 U.S.C. §1983).

In the end, the determination of the attorney's fees award remains in the sound discretion of the district court. *United States*

[7] Section 111 of the MCRA provides that "[a]ny aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court." While the jury returned a verdict in favor of plaintiff on the MCRA claim, the Court today grants judgment notwithstanding the verdict on that claim. Therefor plaintiff may not rely on the MCRA for an award of costs or attorney's fees.

v. *Metropolitan District Commission*, 847 F.2d 12, 14 (1st Cir. 1988). While the district court must supply an ample explanation for the fee award, *id.* at 16, and must "explain why it makes a substantial adjustment, up or down, of a diary-supported bill," *Jacobs* v. *Mancuso*, 825 F.2d 559, 560 (1st Cir. 1987), the district courts need not "drown in the rising tide of fee-generated minutiae." *Metropolitan District Commission*, 847 F.2d at 16.

Plaintiff has submitted ledgers detailing the work performed on the case. The ledgers include the date and type of work performed, an identification of the person who performed the work, and the amount of hours the work required. Plaintiff has also submitted an itemized, computerized record of daily time entries logged by the various individual attorneys that worked on the case. Plaintiff has further submitted affidavits detailing the rates ordinarily commanded by plaintiff's attorneys, and the rates ordinarily charged for cases of this nature. Plaintiff has also explained the contingent nature of the case, and the fact that Mr.Biggins lacked the personal means to bear the costs of maintaining the action since its inception in February of 1988. The Court finds all of these submissions helpful and adequate for the purpose of determining the lodestar.

The Court has carefully examined the documentation in order to determine the number of hours reasonably expended. The Court finds that the documentation adequately distributes core and non-core time. The Court further finds no unreasonable or duplicative fees, and defendants have pointed to no specific instances of misrepresentation or duplicity. The Court finds that plaintiff properly included as core hours the time necessary to complete fee applications. Therefore, the Court adopts, as the number of hours reasonably expended, the core and non-core hours calculated by plaintiff in his motion for attorney's fees and costs. Plaintiff's Motion for an Award of Attorney's Fees and Costs (September 28, 1990)(*see* exhibit A)("Plaintiff's Motion for Fees").

However, the Court will adjust slightly the hourly rates re-

quested by plaintiff. Plaintiff has properly distinguished between core and non-core activities in his fee submissions, but he failed to adopt a different, lower rate of compensation for the non-core hours. The Court, adopting plaintiff's suggestion, will award $165.00 per hour for core work performed by partners at Egan, Flanagan & Cohen, P.C., but the Court will award $100.00 per hour for non-core work performed by these experienced attorneys. *See M. Berenson Co.* v. *Faneuil Hall Marketplace*, 671 F. Supp. 819, 831 (D. Mass. 1987)("The court need not set the same rate for all work performed by a particular attorney; it may assign a different hourly rate to different categories of tasks."). Because no other attorneys performed non-core work, the Court need not discuss other core/noncore payment differentials. The Court will adopt plaintiff's suggestion to compensate Attorney Heemskerk at $135.00 per hour, and the Court will compensate other Egan, Flanagan & Cohen associates at $100.00 per hour. The Court will compensate for paralegal time expended at $50.00 per hour, regardless of the nature of the work.[8]

Having found the requested hours fair and reasonable, and having determined reasonable rates of compensation, the Court calculates the lodestar as follows.

---

[8] In determining the hourly rates, the Court has considered, among other things, the following factors: (1) the amounts awarded in other recent cases, such as *Refuse & Environmental Systems Inc.* v. *Industrial Services of America*, 732 F. Supp. 1209 (D. Mass. 1990) (Freedman, C.J.) and *Cowan* v. *Prudential Insurance Company of America*, 728 F. Supp. 87 (D. Conn. 1990); (2) the Court's familiarity with the value of legal services in the current market generally and within this district in particular; (3) plaintiff's suggested rates; and (4) the submitted affidavits of local attorneys.

Appendix H

Partners				
Core Hours		Rate		Totals
959.40	x	$165.00	=	$158,301.00
Non-core Hours				
99.90	x	100.00		9,990.00
Associates				
Atty. Heemskerk				
.25	x	135.00	=	33.75
Other Associates				
57.60	x	100.00	=	5,760.00
Paralegal				
29.60	x	50.00	=	1,480.00
		LODESTAR FIGURE		$175,564.75

The Court's lodestar figure is $6,493.50 less than the lodestar calculated by plaintiff. This difference occurs solely because the Court compensates partners' non-core work at $100.00 per hour, whereas plaintiff's figures compensated partners' non core work at $165.00 per hour.

As noted above, the Court may adjust the lodestar figure if necessary for the determination of a reasonable and fair fee. *Blum*, 465 U.S. at 898. Plaintiff argues that the Court should enhance the fee award to an amount equal to one-third of the total damages awarded, or $666,729.12. Defendants, of course, oppose any such adjustment.

In *Pennsylvania* v. *Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) ("*Delaware Valley II*"), Justice O'Connor[9] decided that while a district court could properly consider the contingent nature of a case when determining a reasonable

[9] The Supreme Court issued three opinions in *Delaware Valley II*. Justice White, representing four members of the Court, wrote the plurality opinion. Four other justices dissented in an opinion written by Justice Blackmun. Justice O'Connor, writing on her own behalf, concurred in part and in the judgment, but agreed with the dissenters on one important point.

Because Justice O'Connor cast the decisive fifth vote in *Delaware Valley II*, her opinion represents a majority of justices to the extent that she expressed agreement with either the plurality or the dissent. Thus, the Court accepts Justice O'Connor's opinion as the law of the land on the issue.

attorney's fee under federal fee-shifting provisions, *id.* at 731, "a court may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel." *Id.* at 733. Likewise, the Court cannot adjust the lodestar due to the " 'legal' risk or risks peculiar to the case." *Id.* at 734. Neither may the Court consider the quality of the representation or the complexity of the case when considering adjustment of the lodestar. *Pennsylvania* v. *Delaware Valley Citizens Council*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*"). Rather, the lodestar " 'is presumed to be the reasonable fee' to which counsel is entitled." *Delaware Valley I*, 478 U.S. at 564, *citing Blum*, 465 U.S. at 897.

This case is not sufficiently rare or exceptional to justify an enhancement of the lodestar. The Court is satisfied that the lodestar adequately compensates counsel for the work provided in this action, and that an award of $175,564.57 is sufficient to attract competent counsel in the relevant market. Furthermore, the Court cannot, under the law or consistent with conscience, award an attorney's fee almost four times the amount of the lodestar. Such a departure would be an abuse of discretion in light of the frugal methods adopted in recent Supreme Court cases. In sum, because the Court finds that the lodestar figure embodies a reasonable attorney's fee within the meaning of the ADEA and ERISA, the Court will award plaintiff that amount.

2. Costs

Plaintiff may also recover costs of the action under the ADEA and ERISA. As with the attorney's fees, plaintiff may recover costs incurred on the entire action, not just on the federal claims.

Plaintiff claims to have incurred $13,276.57 in costs on the action. The bill properly includes photocopying costs, service of process costs, postage, and other incidentals. However, the bill of costs also includes substantial expert witness fees.

Successful civil rights plaintiffs may not recover more than

$30.00 per day for expert witness attendance fees absent an explicit statutory provision. 28 U.S.C. § 1821; *Denny* v. *Westfield State College*, 880 F.2d 1465, 1468-71 (1st Cir. 1989); *Glenn* v. *General Motors Corp.*, 841 F.2d 1567, 1573-75 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988); *see also Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). Plaintiffs may, however, recover the costs incurred by experts during case preparation, for strategic advice rendered outside the courtroom, and so forth. *Denny*, 880 F.2d at 1474 (Breyer, C.J., concurring) (collecting cases). The ADEA and ERISA, while they do provide for "costs" awards, do not explicitly allow for recovery of expert witness fees. Therefore, the Court must deduct from the costs award those amounts, beyond $30.00, incurred as a result of Dr. Moore's and Mr. Moriarty's attendance.

Plaintiff's bill of costs indicates that plaintiff spent $4,207.50 for the services of Peat, Marwick, Main & Associates, the firm for which Mr. Moriarty works. The bill also shows that Dr. Moore commanded fees totaling $2,945.50. Unfortunately, the bill does not definitively indicate what portion of these fees resulted from the experts' attendance and testimony at trial, and what portion resulted from other, recoverable services rendered by the experts. The Court cannot determine whether the experts charged an hourly fee for attendance, or if they charged lump-sum appearance fees. However, the quality of the testimony and the preparation necessary to properly testify indicates that a substantial portion of the experts' fees were incurred before the experts actually testified. It is fair and reasonable to assume that half of the costs chargeable for the experts resulted from actual testimony time, and half was due to trial preparation and strategy. Thus, plaintiff may recover one-half of expert fees plus the $30.00 attendance fees. The arithmetic yields the following result.

Plaintiff's Costs Incurred	$13,276.57
One-half of Dr. Moore's Fees	- 2,103.75
One-half of Mr. Moriarty's Fees	- 1,472.75
Allowable Attendance Fees	+ 60.00
TOTAL COSTS ALLOWED	$ 9,760.07

D. ***Plaintiff's Motion to Increase the Amount of the Bond***

The Court denies this motion. The question of whether to increase the amount of security is now moot because the Court has ruled on the post-trial motions and plaintiff can execute the judgment. Should defendants appeal today's ruling, they must of course comply with Fed. R. Civ. P. 62(d) and Rule 62.2 of the Local Rules of the United States District Court for the District of Massachusetts.

IV. CONCLUSION

For the reasons stated above, the Court

(1) GRANTS defendants' motion for judgment notwithstanding the verdict on the question of liquidated damages and on count VII, and DENIES the motion for judgment notwithstanding the verdict or new trial in all other respects;

(2) DENIES defendants' motion to alter or amend the judgment;

(3) GRANTS plaintiff's motion for attorney's fees in the amount of $175,564.57, and for costs in the amount of $9,760.07; and

(4) DENIES plaintiff's motion to increase the amount of the bond.

The Clerk is hereby ORDERED to enter judgment in accordance with today's Memorandum and Order, and to award prejudgment interest on the entire award at the appropriate rates.

It is So Ordered.

Chief United States District Judge

APPENDIX I — STATUTE, RULE AND CONSTITUTIONAL PROVISION INVOLVED

The Age Discrimination in Employment Act, 20 U.S.C. § 623 provides in material part:

> § 623. *Prohibition of age discrimination*
>
> (a) *Employer Practices.* It shall be unlawful for an employer — 1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

Fed. R. Civ. P. 38(a) provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.